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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 854 110

L. U. Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, John Strong, Thomas Hickey, Samuel Grasso, Andrew Gabriello and Theodore Schulz,

Petitioners,

against

Motor Haulage Company, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

Louis B. Boudin,
Of Counsel for the Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. .....

LOCAL UNION No. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOHN STRONG, THOMAS HICKEY, SAMUEL GRASSO, ANDREW GAZZILLO and THEODORE SCHULZ,

Petitioners,

against

MOTOR HAULAGE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Your petitioners, Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, John Strong, Thomas Hickey, Samuel Grasso, Andrew Gazzillo and Theodore Schulz, respectfully pray that a *writ of certiorari* issued to review a decision of the Court of Appeals of the State of New York made on April 20, 1949,* which denied a motion for leave to appeal to that Court, thereby affirming a decision of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department,† which affirmed a judgment (17-24)‡ of the said Supreme Court, in and for

* Printed at page 66 of the motion papers upon the motion for leave to appeal to the Court of Appeals.

† Pages 61-64 of motion papers upon motion for leave to appeal.

‡ All references, unless otherwise noted, are to folios in the papers on appeal in the Appellate Division.

the County of New York, made and entered on September 25, 1948, in favor of Motor Haulage Company, Inc. and against these petitioners and all other members of the petitioner Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, confirming an alleged award (190-260) of an alleged arbitrator, which awarded damages in favor of said Motor Haulage Company, Inc. and against these petitioners and all other members of Local 807.

And in support of their petition, your petitioners respectfully show to this Honorable Court:

A

Statement of the Matter Involved

I. The Parties and the Nature of the Judgment Sought to be Reviewed.

Motor Haulage Company, Inc. (hereinafter referred to as "Motor Haulage") is a corporation engaged in the trucking business in interstate commerce having its principal office in New York City, whose employees are members of Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 807") (265).

Petitioner Local 807 is a voluntary unincorporated association and a bona fide labor organization composed of workers engaged in the trucking industry in and about the City of New York (264).

Petitioners John Strong and Thomas Hickey are officers of Local 807, to wit, John Strong is its president and Thomas Hickey is its treasurer, and so far as they acted in or were concerned with the matters which were made the basis of the said award and judgment, they acted as officers of Local 807 in an effort to prevent the actions and events which were made the basis of the said award and judgment sought to be reviewed (290-296).

Petitioners Samuel Grasso, Andrew Gazzillo and Theodore Schulz are members of Local 807, and were totally unaware of any of the actions or events which are made the basis of the said award and judgment sought to be reviewed until long after the same had occurred and were in no way connected with or involved in the same except in so far as they were members of Local 807.

The "award" which is the basis of the judgment sought to be reviewed was based on an alleged violation by some of the employees of Motor Haulage, members of Local 807, of a collective bargaining agreement (148-186, 187-189) between Motor Haulage and Local 807, which allegedly gave Motor Haulage the right to arbitrate disputes growing out of the said collective bargaining agreement.

The judgment sought to be reviewed, is, under the laws of the State of New York, a judgment not only against Local 807 but also against your other petitioners individually, and the same may be satisfied out of their individual property in the event the same is not satisfied out of the treasury of Local 807. It may also be satisfied out of the property which the individual members of the Union may hold in common, aside from the treasury of the Union, without prior resort to such treasury.

II. The Importance of the Matter to the Motor Transport Industry of the Country and to Its Interstate Commerce.

In order fully to realize the importance of the constitutional problems involved and the importance of the correct resolution of these problems to the motor trucking industry of this country, and therefore to the entire commerce of this country, it is necessary to give a brief history of the situation which led up to the organization of the so-called "Arbitration Authority" for the New York Trucking Industry, under which the right to arbitration was claimed by Motor Haulage, as well as of the history of the alleged arbitration and of the litigation which resulted in the judgment sought to be reviewed.

a. ORIGINS OF THE "ARBITRATION AUTHORITY" AND THE INSTRUMENT CREATING IT.

The setting up of the "Arbitration Authority" in the trucking industry of the City of New York was an attempt to remedy the difficulties and evil practices in that industry which were before this Court in *United States* v. *Local 807*, 315 U. S. 521, decided by this Court on March 2, 1942. Although the case came before this Court in the form of a prosecution under the so-called "Anti-Racketeering Act", the record shows that there were in fact two prosecutions, one under the Sherman Act and one under the so-called "Anti-Racketeering Act". The record before this Court disclosed the fact that, although there was no ground for the prosecution either under the Sherman Act or under the "Anti-Racketeering Act", there were serious evils in the industry,—evils for which the defendants in that case were not wholly, or even primarily, responsible. Without going into details, the record clearly showed that certain employers indulged in the practice of entering into what were colloquially called "under-the-hat" arrangements with members of the union, whereby the latter, either because of their eagerness to obtain employment or because of promises of "easy" jobs, agreed to accept employment below the union scale. Another practice disclosed by the record was that employers having their offices in New York City moved the same to some small town and organized what practically amounted to company unions, even though these paper organizations held charters from the International Brotherhood of Teamsters.

To meet this situation, which was harmful to decent employers as well as to the Union, six employer organizations in the trucking industry operating in and from the City of New York, and three local teamsters unions some time in 1940 entered into an agreement covering wages and conditions of employment, commonly referred to as the "wage scale" agreement, and also established by separate agreement an industry-wide Authority for New York City, with

an "Impartial Chairman", at its head, which would have the power to eliminate the evils which beset the industry. It is this latter agreement (187-189, printed in a green booklet separately attached to the Papers on Appeal in the Appellate Division), supplemented by a later agreement between the employer involved in the present litigation and Local 807, sometimes referred to as the "Employment Agreement" (148-186), that is the basis of the claimed right of the employer in this case to the arbitration which resulted in the judgment sought to be reviewed. Its general character as well as its special provisions are therefore of crucial importance, and should be briefly examined.

An examination of this document will show that it was not limited to the settlement of disputes between employers and employees, but had a much broader scope, and that the "Authority" set up thereby was intended to have three kinds of functions: (1) *Conciliation*, leading to "adjustment" of difficulties either between individual employers and employees or between an association and a union (Secs. 3, 16); (2) *Arbitration*, between a particular employer and his employees,—the union acting as the representative of the employees involved (Secs. 4, 5); and (3) making rules and regulations for and adjudicating upon complaints relating to the industry as such. The provisions of this document must therefore be read with these general purposes in mind. Such a reading will disclose that the first two subjects, those dealing with conciliation and arbitration of labor disputes properly so-called, are dealt with in the first five sections of the agreement; while those relating to the evil practices of the industry as a whole, whether growing out of labor relations or otherwise, are dealt with in Sections 10 and 11 of the agreement. Special provisions with respect to the labor contract are contained in other parts of the agreement, notably in Section 15 dealing with causes for discharge or suspension, and Section 26 which contains the general undertaking of the unions with respect

to strikes and that of the employers with respect to lockouts. Sections 1-5 and 10-11 read as follows:

"1. It is agreed that the Union, Employer, Employee or groups of either shall not have the right to modify or waive the provisions of this agreement.

2. Any employee shall file any grievance he may have with the Union representative immediately after the grievance has occurred. The case shall be presented to the Employer's representative in charge, whose answer shall be given within three days. If the Union's representative and Employer's representative cannot arrive at an adjustment of the grievance within five days, same shall be submitted immediately in writing to the Impartial Chairman by an official of the Union or Employer.

3. The Union and its representative shall have the right to originate a complaint in writing other than through an Employee or steward and to seek adjustment with the Employer in the manner herein provided. The Employers' organizations and/or the individual Employer shall have similar rights to originate complaints in writing for the like purpose of effecting adjustment with the Employee. Settlement on such complaint not made locally shall be submitted to the Impartial Chairman.

Before any arbitration is requested, it is expected that the Union and the Employer shall try earnestly to adjust the differences between themselves, and no case shall be brought before the Impartial Chairman unless all preliminary attempts to adjust the differences have failed.

4. Any and all disputes and controversies arising under or in connection with the terms or provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect of anything not herein expressly provided but relative to the subject matter of this agreement, which the representatives of the Union and the Employer have been unable to adjust, shall be submitted to arbitration by Hugh E. Sheridan, as the Impartial Chairman, whose decision shall be binding and conclusive on all parties.

5. Either party shall have the right upon the failure of the representatives of the Union and the Employer to adjust their differences, to demand arbitration upon at least three days' notice, to be given to the other party to the controversy and to the Impartial Chairman. Notices demanding arbitration shall be given in writing and in the case of the Union, shall be signed by a duly authorized executive official of the Union, and in the case of the Employer, by a duly authorized executive official of the Employer. Notice demanding arbitration and reply thereto shall be given in writing on forms prescribed by the Impartial Chairman.

10. In all disputes and controversies presented to him, the Impartial Chairman may make such award or decision or disposition of the matter as to him seems just and which, in addition to awarding any sum of money or damages or any other relief, may contain provisions commending or restraining acts and conduct of the Employer or the Union. Any such award or decision may be enforcible by appropriate proceedings in law or in equity.

11. In any decision or award, the Impartial Chairman, in his discretion, may include a sum reimbursing or compensating the winning party in whole or in part for the expense to which it has been put in such arbitration.

The Impartial Chairman may assess damages for the violation of the terms of the Wage Scale agreement as supplemented by this arbitration agreement. Such assessment shall be an amount, in whole or in part, for advantages gained through violation of this agreement and serve as a deterrent against future violations.

The Impartial Chairman may award in whole or in part, such assessment levied, to the aggrieved parties provided that in his judgment such parties are deserving of receiving such award. When the parties aggrieved are judged to be undeserving, the award shall be paid into the general fund for administering this arbitration agreement.

In the event that any party fails or refuses to abide by the decision or award of the Impartial Chairman,

such party shall thereupon forfeit all rights and benefits of the Union agreement. Such rights and benefits may be restored only upon application to the Impartial Chairman, who shall determine under what terms and conditions they may be restored."

The respective undertakings of the Unions and the employers with respect to strikes and lockouts, reads as follows:

"26. No strikes, lockouts or walkouts shall be ordered or enforced by either party hereto against the other during the life of this agreement, except that it shall not be a violation of this agreement for the Union to refuse to allow its members to deliver to or pick up from a strike bound job, after notifying the Impartial Chairman in advance."

These provisions must be read in the light of the preamble to this agreement which refers to the origin and the purposes of the same in the following language:

"WHEREAS, said Union and Employer have entered into an 'Employment Contract', same consisting of eighteen sections, in which Employment Contract it is provided in Section 14 thereof:

'It is agreed that the Union will cooperate with the Employer to eliminate unfair trade practices and labor abuses detrimental to the industry and to the parties to this agreement, and in the event a substantial and representative group of employers, parties to similar agreements, cooperate for such purpose, to set up satisfactory machinery with the view to effecting such elimination as is herein referred to.'"

And the peculiar provisions of Section 11 clearly show that the contracting parties had in mind the "labor abuses" of the "under-the-hat" agreements disclosed in the record which was before this Court in the case of *United States* v. *Local 807*. It is clear that the contracting parties intended to leave it to the Impartial Chairman to decide whether an employee who was underpaid under an "under-the-hat" agreement, being *particeps criminis,* should or

should not receive the amounts which he is found to have been underpaid and which were assessed against the employer as damages.

Further examination of Sections 2 to 5, on the one hand, and Sections 10 and 11, on the other, will disclose a basic difference between them: While the provisions of Sections 10 and 11, which were intended to deal with "unfair practices" and "labor abuses" affecting the industry generally, are couched in broad and vague terms, the provisions of Sections 2-5, dealing with particular disputes between employers and employees, are cast in *precise* and *limiting* terms, and are preceded by Section 1 which expressly provides that neither the Union nor the employer *may waive the same.* It should be observed that Sections 2 to 5 carefully differentiate between "complaints" which may be "adjusted", and "demands" for arbitration. The former may be made either by an employer or an employers' association; while the latter can be made only by the employer or the union, upon forms to be specifically prescribed by the Impartial Chairman, and by executive officials thereunto duly authorized by the employer or union, as the case may be.

b. History of the "Arbitration Authority" and the facts in the "alleged dispute" and the alleged "Arbitration".

The agreement setting up the "Arbitration Authority" was, as is shown by its terms, supplemental to a collective bargaining agreement between the unions and the employers' associations parties to it. The collective bargaining agreement was to expire on August 31, 1942; and the agreement setting up the "Authority" was made to expire at the same time (299). Both the collective bargaining agreement and the supplemental agreement setting up the "Authority", were renewed twice, each for a term of two years,—the first renewal running from September 1, 1942, to August 31, 1944, and the second running from September 1, 1944, to August 31, 1946 (299-300). There was no fur-

ther renewal to either agreement, and the "Authority" ceased to exist on August 31, 1946 (300-301). The original agreement setting up the "Arbitration Authority" named Hugh E. Sheridan as Impartial Chairman, and contained provisions for the manner of the selection of his successor in certain eventualities (Secs. 22-23). The renewal agreements continued Sheridan in the office of Impartial Chairman.

On September 6, 1944, Motor Haulage entered into an individual "Labor Agreement" with Local 807 (148-186). This agreement incorporated the "Supplemental Agreement" by reference and it specifically provided that disputes which could not be settled between the employer and the union should be submitted for arbitration "to the Arbitration Authority for the Trucking Industry of the City of New York".

Motor Haulage employed some 400 truck drivers, members of Local 807, in four garages. On April 9, 1946, the drivers in three of its garages, numbering about 300, stopped work because of a dispute with its employees in the fourth garage over a problem of seniority. Concededly, this was an intra-union dispute and did not involve any dispute with the employer. Upon being notified of the stoppage, the president of the union immediately ordered the men to work, but the men refused to obey. On the following day, April 10, 1946, the employer thereupon addressed to the Impartial Chairman a letter reading as follows (326-329):

"My dear Mr. Sheridan:

On Tuesday, April 9, 1946, our drivers and helpers working out of our garages located at:

23 Congress St., Brooklyn, N. Y.
Bond & Carroll Sts., Brooklyn, N. Y.
214 West Houston St., New York, N. Y.

refused to go to work, and our investigation indicates *that the difficulty is an intra-Union dispute,* as a consequence of which our rights under our contract were violated.

We also understand that this stoppage of work *is entirely unauthorized* and consequently is illegal, and we are also advised that the steward, Joseph S. McCarthy, refused to put the men back to work on the morning of April 10 *after being ordered to do so by the President of Local 807 on the evening of April 9.*

This stoppage of work prohibits our carrying out our contracts with our customers and, because of its illegal nature, we therefore request an immediate hearing and demand made upon Local 807 to show cause (1) why these men have not been put back to work as ordered by the officials of Local 807 and (2) why we should not be reimbursed by Local 807 for losses and damage sustained as a result of this illegal stoppage of work."

Upon receipt of this, and on the same day, the Impartial Chairman caused to be delivered to the Union a letter (376-378) enclosing a copy of this letter, and referring to it as a "complaint", and stating that "in view of the grievous nature of this complaint, and in order to adjust this matter with the least practicable delay, the undersigned is calling an immediate hearing for this evening, April 10, 1946, at 9:00 p. m., at this office" (378).

In pursuance to this letter officers of the Union and representatives of the employer met with a committee representing the workers engaged in the stoppage at the office of the Impartial Chairman, with the result that the committee representing the rebellious workers agreed to advise the men to go back to work the following morning (387-398). In order to assure the return of the men, the officers of the Union at the conclusion of the conference (about 2 A. M. the following morning) went to the garage and stayed there until after 8 A. M., to make sure that the men would return to work. They did (290-295). Subsequently, on April 18th, the Impartial Chairman filed a memorandum stating the facts as recited above (379-399).

Local 807, and, apparently, Motor Haulage, thought that that was the end of the matter. But on May 31, 1946, the

employers' association of which Motor Haulage was a member, wrote to the Impartial Chairman as follows (400-403):

"Dear Mr. Sheridan:

In behalf of the Motor Haulage Company, Inc., a member of this Association, we hereby petition you for an early hearing of this Company's complaint against I.B. of T. Local 807, and those members of this Union who are employed by this Company and who participated in an illegal strike or walkout on April 9th and 10th of this year.

In its complaint against Local 807 and those members of the Union who participated in this alleged illegal strike or walkout, the Company charges said Union and members with failure to comply with their obligations as described in Section 26 of the Supplement to the labor agreement, which sets up the Arbitration Authority for the New York City Trucking Industry, and which is now in effect between the Company and the Union. The Company avers that as a result of this failure a large portion of its operations were tied up or otherwise disrupted and that it suffered substantial financial damage thereby.

Wherefore, *pursuant to Sections 10 and 11* of the above mentioned supplement, the Company petitions for an award of Ten Thousand Dollars ($10,000) in payment for the loss suffered by it as a consequence of the strike or walkout. The particulars and substantiation of this claim we will present at the hearing."

It does not appear whether Motor Haulage authorized the writing of this letter or whether it knew anything about it. And it appears that the Impartial Chairman did nothing concerning it, except that more than a month afterwards, on July 2, 1946, he wrote to the Association in question as follows (406-408):

"Gentlemen:

Re: Complaint of May 31, 1946
The Motor Haulage Company, Inc.
v.
Local 807, International
Brotherhood of Teamsters.

This will serve to confirm the granting of your telephone request of this date, in behalf of The Motor

Haulage Company, Inc., to postpone until further notice hearing of the company's complaint in the above-entitled matter."

Nothing further was done in the matter during the existence of the "Authority". As already stated, the "Authority" ceased to exist on August 31, 1946, and was never revived. *On October 12, 1946, the membership of Local 807 voted to instruct the officers of the organization not to enter into an agreement reviving the "Authority", if the employers insisted on Hugh E. Sheridan being the Impartial Chairman* (302-303).

On November 18, 1946, Hugh E. Sheridan wrote to Local 807 as follows (410-413):

"Gentlemen:

Reference is made to a letter of the Motor Carrier Association of New York, dated May 31, 1946 (copy herewith) requesting, in behalf of The Motor Haulage Company, Inc., arbitration of a matter involving members of your union employed by said company, accused of having 'participated in an illegal strike or walkout on April 9 and 10 of this year'.

Reference is also made to a letter from Local No. 807, dated August 15, 1946 (copy herewith), in which your union requests arbitration of a dispute with the Motor Haulage Company, Inc., for allegedly 'violating the seniority clause'.

Hearings upon both disputes mentioned above were postponed, upon request of the parties, during negotiations for a new wage scale agreement. Within the past week, however, request has been received from both sides for hearing of these pending disputes.

Will the union kindly arrange to have its representatives, as well as any witnesses it may deem necessary, available at the appointed time, ready to present the union's position in this matter."

This is the first time the word "arbitration" had been used in connection with this matter by anybody; and neither the words "strike" nor "walkout" were used in either the employer's letter of April 10th to the Impartial Chairman

or in the Impartial Chairman's letter of the same date to the Union,—in both of which letters the occurrence was referred to as an unauthorized "stoppage".

As a result of this letter, representatives of the Union and of the employer met in Sheridan's office on November 26th; and it is claimed on behalf of the employer that that meeting constituted a "hearing" on the employer's alleged claim and a submission of an alleged "dispute" to Sheridan as "Arbitrator". As the Court will see further below there is no warrant in fact for that claim, and the sworn testimony (299-309) of the only person present at that meeting who has made affidavit in this case contradicts that claim, and clearly establishes that the alleged "hearing" and "submission" are a pure fabrication in an effort by Sheridan to wreak vengence upon the Union for refusing to continue him in his office of Impartial Chairman of a revived "Arbitration Authority". At this point we desire only to point out, that concededly, no testimony was offered by the Union under its alleged request for arbitration, and that no decision of any kind was made in that matter. Following this meeting, and on January 17, 1947, Hugh E. Sheridan made an alleged "award" (190-260) in favor of Motor Haulage, which was made by the New York Courts the basis of the judgment sought to be reviewed.

In this "award" there is no finding that the Union either called or enforced any strike or walkout,—as, indeed, there couldn't be any. But the "award" is avowedly based on Sheridan's contention that a labor union ought to be responsible for the acts of its members, even though they concededly acted in a rebellious manner, contrary to its specific orders,—and even though all it had agreed by its contract was not to *call or enforce* any strike or walkout. In his "award" Mr. Sheridan thus states the considerations which prompted him to make the same (225-241):

> "At the outset, the undersigned thinks it pertinent to remark that he is not unmindful that the issues which the present dispute raises are but facets of the

same broad issues with which legislative and judicial minds on the state and national scene are presently coping in the field of labor-management relations. On all sides today persons in places of high authority are attempting to evaluate the proper position in labor and management in their everyday relations with one another and clarify the rights and obligations of each.

In this connection, there probably has been no more complex and challenging a problem than that of attempting to strike a proper balance between the protection of labor's rightful gains, on the one hand, and the curbing of the irresponsible use of these gains, on the other. * * *

One of the major threats to a continued healthy existence for the whole labor movement today, in the opinion of the undersigned, appears to be labor's tendency, in certain quarters, to fail to take steps to insure that it always will be regarded as a 'responsible party', before, during, and after contract negotiations.

In coming to a decision in the instant case, the undersigned has uppermost in his mind the desire to promote the ideal of union responsibility, * * *.

The crux of the present issue, as the undersigned see it, is that a wrong was committed, a breach of the contract between the Company and the Union took place. For that wrongful breach there should be a remedy. Particularly does that seem proper because, without remedy, not only is an injustice done the other party to the contract, but a further inroad is made into the already tottering ideal of union responsibility. * * *"

c. History of the litigation in the New York Courts.

No process of any kind, recognized by the New York Courts, was ever served on the Union, any of its officers or members.

The Court will have noted that the claimed "hearing" on November 26th was held in pursuance to a letter to the Union asking the Union to attend in answer to an alleged complaint made by an association on behalf of Motor Haulage. As the "Arbitration Authority" was out of existence

and the Union did not recognize Sheridan's authority as "Arbitrator", its representatives attended merely to inform Sheridan that it did not intend to present any matter for his arbitration, and would not recognize his authority to arbitrate any matter presented by Motor Haulage. Under the circumstances, it did not think it necessary to be represented by counsel, and no attorney or counsel attended on its behalf.

On or about February 21, 1947, the firm of Boudin, Cohn & Glickstein, who had acted as attorneys for the Union in other matters, but who were utterly unaware of the existence of this alleged "dispute" or of the alleged "Arbitration", were served with a notice of motion, *addressed to them*, as attorneys (122), advising them that an application would be made to the New York Supreme Court, New York County, for an order confirming the alleged award. This notice was entitled as follows: "In the Matter of the Arbitration of Controversies between Motor Haulage Company, Inc., Petitioner, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers and Chauffeurs, Local No. 807, Respondent" (118-119).

Believing that it was their duty to inform the New York Supreme Court of the Union's contention that Motor Haulage was not entitled to arbitration for the reasons indicated above, the said attorneys presented to the said Supreme Court an affidavit by the said Harry E. Thompson answering the assertions in the petition made by an officer of Motor Haulage, who was not present at the alleged hearing. Thompson's affidavit denied that there had ever been a dispute between the parties, or an arbitration of such dispute, and specifically charged that the whole proceeding was the result of a conspiracy between the said Sheridan and one Adelizzi, the manager of the employers' association of which Motor Haulage was a member, to mulct the Union in damages because of its opposition to the revival of the Arbitration Authority (299-309). Naturally enough,

this affidavit also called attention of the Court to the outrageous character of the so-called "award", and in this connection, specifically appealed for protection to the United States Constitution and to the provisions of the Norris-LaGuardia Act. The said affidavit concludes as follows (320-324):

"I respectfully submit that what Mr. Sheridan in his so-called 'award' was trying to do and what petitioner is trying to have this Court do upon this motion is to take the money of the members of Local 807 and to pay it to petitioner, even though these members have done nothing wrong and were not in any way privy to or cognizant of the actions of the members complained of. Such action is clearly contrary to basic notions of right and wrong on which our system of jurisprudence is based and contrary to the specific provisions of the Constitution of this State and of the 5th and 14th Amendments to the Constitution of the United States, the protection of which is herewith specifically invoked, which, in the so-called 'due process' clauses prevent the taking of money from one person and giving it to another except in pursuance to valid law.

Aside from the basic law and constitutional provisions, the so-called 'award' is also invalid because it is contrary to specific law, namely, Subdivision 6 of Section 876-a of the Civil Practice Act and Section 6 of the Act of Congress, commonly known as the Norris-LaGuardia Act and to the policy of the State of New York, as expressed by the provision of the Civil Practice Act referred to and the policy of the United States, as expressed in the Act of Congress referred to. Section 6 of the Norris-LaGuardia Act, which is applicable to labor relations in interstate commerce reads as follows:

'No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of,

such acts, or of ratification of such acts after actual knowledge thereof.'

The Union hereby invokes the immunity granted by the specific language of the said Act of Congress, as well as the policy of the United States as embodied in the said Act."

The Special Term of the New York Supreme Court, being of the opinion that the character of the award was such as to preclude its confirmation, denied the motion to confirm without considering the other questions raised in that affidavit and in an additional affidavit (419-432) submitted by the same business agent of the Union. The opinion of the Special Term is printed at folios 436-446 of the record.

Motor Haulage thereupon appealed to the Appellate Division of the New York Supreme Court, and that Court reversed the decision of the Special Term in a brief memorandum opinion printed at folios 469-471 of the record, solely on the ground that under the New York law, as supposedly laid down in two cases cited by it, the Courts have no right to set aside an award either because it is contrary to law or contrary to fact. As will be shown in the brief annexed to this petition, that statement was not a correct statement of the law of the State of New York as applied to business corporations and businessmen. Here we merely call attention to the fact that the Appellate Division made its decision in the teeth of the fact, appearing on the record, that Motor Haulage had failed to comply with the conditions precedent contained in the agreement with respect to the right to arbitration even while the agreement and the Arbitration Authority were in existence, and in utter disregard of specific provisions of the Arbitration Law of the State of New York, as construed by its highest Court, with respect to the kind of notice required in order to constitute due process. Furthermore, the Appellate Division ignored the provisions of the Arbitration Law with respect to the questions of fact raised by the affidavits submitted by Harry J. Thompson, including the question of corrup-

tion in the making of the award. It is clear, and we so charge, that the reason for this decision of the Appellate Division was the same as that which led the alleged "Arbitrator" to make his alleged "award", according to his own statement,—namely, that the Court wanted to impose a special kind of liability on labor unions and their members which is not applicable to business corporations, business associations and businessmen generally.

Local 807 thereupon appealed to the Court of Appeals of the State of New York from the judgment entered upon the order of the Appellate Division, with the result that the Court of Appeals reversed that judgment because of the *form* of the proceeding, in an opinion (44-47) in which it stated that it found no error of substance in the decision of the Appellate Division. In connection with the question of *form*, it should be stated here that counsel for the Union upon whom the notice of motion to confirm was served, as hereinbefore stated, took the position that under the law of the State of New York, as interpreted by its highest Court and as uniformly applied by all the Courts, a voluntary unincorporated association, such as Local 807, cannot be sued in its common name; that any action or proceeding in that form is a nullity; and that there was, therefore, no party before the Court except Motor Haulage. As the Court will see from the brief attached to this petition, that position is clearly sustained by the decisions of the New York Courts as generally applied to business associations. But in its opinion of reversal, which was written *per curiam* and is very brief (44-47), the Court of Appeals, citing a memorandum opinion of the Appellate Division of the New York Supreme Court, Second Department, declared that where the process had *actually been served* on one of the officers provided for in Section 13 of the General Associations Law of the State of New York, the "irregularity" may be corrected "in the absence of prejudice to a substantial right". As already stated, in this case *there never had been any service of any process of any kind on either the*

president or the treasurer of Local 807, the only two officers of an unincorporated association upon whom process may be served under Section 13 of the New York General Associations Law, nor upon any officer of the Union for that matter. Nevertheless, the attorneys for Motor Haulage, disregarding the contention contained in the opinion of the Court of Appeals, and treating the decision of the Court of Appeals as a mandate to the Supreme Court to disregard the "irregularity", moved the Supreme Court, at a Special Term, for an order amending the original motion to confirm the "award" by substituting the names of John Strong as president and Thomas Hickey as treasurer, in the place of the common name of Local 807 as party respondent in the proceeding. This notice of motion was again *directed to and served upon* the attorneys (33), and was entitled in the same manner as the original notice of motion,—that is to say, *this motion was made not as the commencement of a new proceeding but as a motion in the old proceeding* (25-26). The attorneys upon whom the motion was thus served again found themselves compelled to appear in court and call the attention of the Court to what had happened. This was done by an affidavit of Louis B. Boudin, a member of the firm of attorneys upon whom the motion was served. He gave a resumé of the facts, which appeared from the record in the Court of Appeals which, in turn, was made part of the papers upon which the motion to amend was made, thus bringing before the Court the constitutional problems involved in the original proceeding. He also specifically raised the constitutional point that the proceeding deprived Local 807 and its members of the protection of the "equal protection of the laws" provision of the Fourteenth Amendment (65 et seq.). The Special Term accepted the view of the attorneys for Motor Haulage as to the meaning of the decision of the Court of Appeals, and thereupon entered a new judgment (17-24) running against John Strong as president and Thomas Hickey as treasurer of Local 807, under the provisions of

Section 13 of the General Associations Law. This judgment, as will be shown in the brief to be attached hereto, is, under the law of the State of New York, a judgment not only against Local 807,—that is to say, against the common treasury of the organization,—*but against each and every member of the organization.*

This procedure in entering a judgment in a case in which not only the members had not been served with any process but where even the officers designed by Section 13 of the General Associations Law had not been served, is sought to be justified under the provisions of Section 1461 of the New York Civil Practice Act. It is unnecessary to enter here upon the question whether the provisions of that section justify such a procedure, since if it did justify such a procedure *it would clearly violate the provisions of the Fourteenth Amendment guaranteeing to every person due process of law.*

The case in this new aspect thus has added a number of basic constitutional questions to those involved in the case as it stood when the New York Court of Appeals first passed upon it. In this connection we desire to call the attention of this Court to another phase of the aspect of due process involved in this case. Here a judgment was based upon the alleged "award" of an alleged arbitrator, in a situation where "the parties to be charged" had never made any agreement to arbitrate, since there is no claim that the individual members of the Union made any agreement with Motor Haulage to arbitrate anything. Concededly, under the well settled law *as declared by this Court* and also by the Courts of the State of New York, a collecting bargaining agreement made by a union with an employer, including the agreement to arbitrate, binds only the Union in its collective capacity and such of its members as may accept employment under that agreement. The vast majority of the more than 10,000 members of Local 807 had never entered the employ of Motor Haulage and were therefore not privy to the agreement under which the right to arbitrate was claimed.

Petitioners John Strong and Thomas Hickey, who were thus brought into the case for the first time by the judgment of the Special Term entered in the Supreme Court after the first decision of the Court of Appeals, appealed to the Appellate Division of the Supreme Court from the said judgment. On this appeal counsel for Motor Haulage took the position that *all* of the questions involved in this case had been raised by the new appellants in the earlier suit to which Local 807 in its collective capacity was a party, and that the Appellate Division was, therefore, bound by the earlier decision of the Court of Appeals. The Appellate Division apparently concurred in that view, for it affirmed the judgment of the Special Term without an opinion. The petitioners John Strong and Thomas Hickey thereupon made application to the New York Court of Appeals for permission to appeal to that Court, but that application was denied without opinion on the 20th day of April, 1949.

The notice of motion and other papers which were filed in the Court of Appeals upon the application for leave to appeal, which stated in detail the questions arising under the Constitution and laws of the United States, are among the papers certified to this Court by the Court of Appeals. This petition is based upon the said papers, as well as the record of the case which was in the Appellate Division of the New York Supreme Court, and which was also part of the papers upon which the application to the Court of Appeals for leave to appeal was made, under the rules regulating the practice of the New York Courts.

B

The Questions Presented

The questions presented are of basic constitutional importance, to wit:

I. May the State of New York deprive any person of due process of law by denying him access to its regular courts in defense of his property rights, in cases in which he is entitled under the constitution and laws of the State to trial by jury, merely because a labor union of which he is a member has entered into a collective bargaining agreement with an employer providing for arbitration, where he has not taken employment under that agreement, and where, concededly, he was not in any way personally involved in the alleged breach and was not even aware of it?

II. May the State of New York make and enforce a judgment against any person without that person ever having been served with any process out of any court or with any notice of any claim to arbitration or with any notice of the arbitration itself?

III. May the State of New York make and enforce such a judgment against a member of a labor union, without the service upon him of any process out of any court, without notice of any claim to arbitration, and without notice of the arbitration itself, in a case where no process has been issued upon the Union itself or any of its responsible officers?

IV. May the State of New York make and enforce a judgment against a local union, being a voluntary unincorporated association, and/or its members, on an alleged award of an alleged arbitrator where the members out of whose property the judgment may be satisfied, concededly never entered into an agreement to arbitrate, and where

the Union itself denies the existence of the agreement to arbitrate, or that conditions precedent to arbitration contained in the alleged agreement to arbitrate have not been complied with, without giving the Union or its members an opportunity to test the questions thus raised in the regular courts?

V. May the State of New York make and enforce a judgment against a labor union and its members, based upon an alleged award of an alleged arbitrator in which the right of the arbitrator to act is denied, without giving the Union and its members an opportunity to have that question tried in, and passed upon by, the regular courts?

VI. May the State of New York make and enforce a judgment against a local union and its members mulcting it and them in damages for an alleged wrong, namely, a "wildcat" stoppage, which it and they have concededly not committed, and which the Union's officials concededy sought to prevent, in a situation where the only thing that the Union undertook by the agreement under which arbitration was claimed was not to *order to enforce* a strike or walkout?

VII. May the State of New York make and enforce a judgment against a labor union and its members upon an alleged award of an alleged arbitrator who avowedly based his finding of liability upon the character of the labor union as a labor union, in a situation in which, under the laws of the State of New York, no such liability could be enforced against a business corporation or business association?

VIII. May the State of New York make and enforce a judgment against a labor union and its members based upon an alleged award of an alleged arbitrator, where, indisputably, the employer in whose favor the award is made and judgment granted, has failed to comply with conditions precedent to the right to claim arbitration, in a situation where the agreement specifically provides that those conditions could not be waived by the Union, where,

concededly, under the laws of the State of New York, the right to arbitration can only be based on an agreement to arbitrate, and that an alleged award of an arbitrator cannot be enforced without such an agreement executed by the party to be charged or his lawful agent and that without such an agreement a judgment entered upon such an award would be contrary to due process under the Constitution and the laws of the State of New York.

IX. May the State of New York make and enforce a judgment against a labor union and its members, under conditions which its Courts have held would not constitute due process, because of lack of proper notice and an opportunity to test the question of the right to arbitration in the regular courts, had the parties against whom the arbitration process was directed been ordinary business corporations, business associations or business men?

X. May the State of New York make and enforce a judgment against a labor union and its members where the Union claims, and the undisputed facts support, a claim that the award was the result of bias, prejudice and corruption, without the Court making the judgment confirming the alleged award inquiring into or passing upon such claim, in a case where its statutes specifically provide that such a claim may be raised in court when confirmation of the award is sought, and the Courts of the State of New York have uniformly followed that statutory provision in cases where the claim was raised by business corporations, business associations or business men?

XI. May the State of New York make and enforce a judgment for damages, based upon an alleged award, in a dispute where the employer and employees are engaged in interstate commerce, the dispute involves interstate commerce and the damage is supposed to have been suffered by the employer in his interstate commerce, contrary to the provisions of Section 6 of the Act of Congress com-

monly known as the Norris-LaGuardia Act, and the policy of the United States, in a situation where, concededly, the right to the making of an award is based upon an agreement to abide by the decision of the arbitrator, and the Act of Congress specifically provides that all agreements contrary to the policy declared thereby are void?

C

Reasons Relied On for the Allowance of the Writ

It is clear from the foregoing that the instant case presents basic constitutional questions under the Fourteenth Amendment, as well as a serious problem of Federal relations arising under the Commerce Clause. These questions have never been passed upon by this Court in the form in which they are presented in this case. Nor is the importance of the case limited to the labor union and its more than 10,000 members who are directly involved in this case. We believe that the question in both of its aspects affects every person who looks to the Fourteenth Amendment to the United States Constitution as a protection of his basic constitutional rights, and everyone who is engaged in interstate commerce who looks to the Constitution of the United States and the Acts of Congress made in pursuance thereof for the protection of his rights as well as for guidance in determining his cause of action.

We take it that it is unnecessary to urge upon this Court the importance of the amicable settlement of labor disputes, and the great role which arbitration has come to play in effecting the same. Nor is it necessary to point out to this Court that it is of the greatest public importance that the arbitration process should be encouraged and stimulated by all legitimate means, and that everything which tends to thwart that process should be eliminated. We shall, therefore, only point here to the fact that this has been the policy of the United States Government for decades past, as that policy has been reflected by congressional legislation. Without enumerating the various congres-

sional enactments bearing on the subject of conciliation and arbitration, it is sufficient to point to the fact that the act of Congress, commonly known as the Norris-LaGuardia Act (which was specifically invoked by Local 807 and its officers in the New York Courts), provides that no injunction shall be granted by any court or judge of the United States to a complainant who has failed to make use of any governmental or voluntary conciliation or arbitration agency of which he had a right to avail himself.

Your petitioners have already pointed out that the so-called "Arbitration Authority", under which arbitration was claimed by Motor Haulage, had been set up in order to furnish a means of conciliation and arbitration for the settlement of labor disputes, among others; and that, in order to make such machinery effective, it was necessary to eliminate certain "abuses" existing in the industry which made healthy labor relations in the industry impossible. Your petitioners aver that Local 807 has been not only ready and willing but anxious to cooperate with employers in setting up conciliation and arbitration machinery which would be effective in eliminating the abuses referred to above and insuring the just settlement of disputes. Since the decision of the Court of Appeals in this case, however, counsel for Local 807 have felt that they could not possibly advise the Union to enter into an agreement renewing the life of that "Authority", or setting up a similar one, because of the great dangers to which the Union and its members would expose themselves.

Your petitioners are further informed that the following additional dangers are inherent in the decision of the New York Courts in the instant case: (1) the disregard by the Courts of the limiting provisions of the arbitration agreement; (2) the disregard of conditions precedent contained therein to the right to arbitration, *which by the terms of the agreement itself could not be waived;* (3) the refusal of the New York Courts to enforce the provisions of the

Arbitration Law with respect to due notice, or their interpretation in such manner as to furnish no protection under the due process clause of the Fourteenth Amendment; and (5) the refusal of the Courts to give to petitioners the protection of the specific provisions of the Arbitration Law of the State of New York furnishing protection against biased and corrupt awards. All of this makes the setting up of regular conciliation arbitration machinery a matter of extreme hazard.

Your petitioners realize that this Court cannot remedy situations which lie beyond the jurisdiction of Federal Courts. But aside from the fact that the questions of due process of law presented by this case are within the purview of this Court, the problems presented here arise in interstate commerce, which involves the application of Federal law and Federal policy. A review by this Court, and, as we hope, a decision that the making of an arbitration agreement does not deprive labor unions and their members either of the requirements of due process or of the protection of acts of Congress specifically enacted for the regulation of labor disputes, would make it possible for labor unions whose members are engaged in transportation and other phases of interstate commerce to set up conciliation and arbitration machinery which would be effective and at the same time assure the just resolution of labor disputes.

WHEREFORE, your petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in the said suit and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated: New York, May 25, 1949.

LOUIS B. BOUDIN,
of Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. .....

LOCAL UNION No. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOHN STRONG, THOMAS HICKEY, SAMUEL GRASSO, ANDREW GAZZILLO and THEODORE SCHULZ,

Petitioners,

against

MOTOR HAULAGE COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI

POINT I

The scope and meaning of the judgment sought to be reviewed.

In order to fully appreciate the significance of the constitutional problems raised by this case, it is necessary to examine the relevant statutes of the State of New York so as to ascertain the scope and meaning of the judgment sought to be reviewed. When those statutes are examined, it will be found, we respectfully submit, that the judgment sought to be reviewed, although in form running merely against two officers of Local 807 in their official capacity,

is actually a judgment against all of the members of that organization, since it can be satisfied against any property owned in common by the members of Local 807, apart from the treasury of the organization itself. Even more important, the judgment finally adjudicates the liability of *all* of the members of Local 807 for the alleged wrong or breach of contract claimed to have been suffered by Motor Haulage because of the "stoppage" of *those members of Local 807 who were employed by Motor Haulage*,—a "stoppage" which was concededly unauthorized by Local 807 and of which the vast majority of its members, more than 10,000 in number, were totally unaware until long after it was over.

Section 13 of the General Associations Law of the State of New York reads, so far as material here, as follows:

> "Action or proceeding against unincorporated association—
>
> An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against *all* the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, *or their liability therefor, either jointly or severally.* * * *" (Italics supplied throughout unless otherwise noted.)

The language of the statute is clear and unmistakable,—this form of action is intended to apply, and is limited to, cases where the plaintiff has a cause of action against all of the members of the association. Its history shows that it was intended to obviate the necessity of making all the members of the association, who are apt to be numerous, parties defendant in a case where the members own property in common, either by way of the association's treasury or otherwise.

Section 17 of the General Associations Law therefore specifically provides that this form of action is permissive

only and does not prevent the bringing of an action against all of the members of the association if the plaintiff so chooses. In so far as pertinent, Section 17 provides as follows:

> "Article permissive; effect upon statute of limitations—
>
> This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. * * *"

The exception referred to is intended to prevent the simultaneous bringing of two actions, one in the form permitted by Section 13, and one against all of the members of the association.

Section 16 therefore provides that where an action has been commenced in the form permitted by Section 13, no action can be brought against all of the members individually until a final judgment has been recovered in the first action and remains wholly or partly unsatisfied. The pertinent provisions of Section 16 are as follows:

> "Subsequent action against members—
>
> Where an action has been brought against an officer, * * * another action, for the same cause shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:
>
> 1. Where he was the plaintiff, * * * he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, * * * and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution was insufficient to satisfy. * * *"

Finally, Section 15 provides that a judgment recovered in an action brought in the form prescribed by Section 13

may be satisfied " * * * out of any personal or real property belonging to the association, *or owned, jointly or in common, by all the members thereof*".

Under the provisions of Section 15 an execution under a judgment obtained in an action or proceeding brought in the form prescribed by Section 13, may therefore be satisfied *either* out of property owned by the association *or* out of property owned jointly or in common by all the members as distinct from the association itself. And, significantly, there is no provision that an attempt must be made to satisfy the judgment out of the property owned by the association itself before it may be executed against the property owned by the members as distinct from the association. The reason is obvious: Since the right of action under Section 13 is limited to cases in which *all the members of the association* are liable, there is no reason why the judgment may not be executed against property owned by all of them jointly or in common without putting upon the plaintiff the obligation to resort, in the first instance, against the property of the association.

Such being the obvious intention and meaning of these provisions, the New York Courts have uniformly held that the right of recovery in a suit or proceeding under the provisions of Section 13 of the General Associations Law is limited to cases in which *all* of the members of the association are liable jointly or severally. Of the many cases that could be cited we shall cite only the following cases decided in the Court of Appeals:

McCabe v. *Goodfellow*, 133 N. Y. 89;
Schouten v. *Alpine*, 215 N. Y. 225;
Browne v. *Hibbets*, 290 N. Y. 459;
Glauber v. *Patoff*, 294 N. Y. 583.

Three things are therefore clear from the preceding discussion:

1. The judgment sought to be reviewed is clearly an adjudication that all of the members of Local 807 are liable

for the damage claimed to have been sustained by Motor Haulage by reason of the stoppage of a few of its members, even though such stoppage was never authorized by the Union nor approved by its officers, and of which the vast majority of the more than 10,000 members of the Union were utterly unaware.

2. Execution issued upon the judgment sought to be reviewed may be satisfied out of any property owned jointly or in common by the members of Local 807; and may be satisfied out of such property without previous recourse to the property of the association itself.

3. Should such an execution be returned unsatisfied, wholly or in part, after an attempt has been made to satisfy the same out of the property of the association or of the property owned by the members themselves in common, all the members may be sued for the amount of the judgment, or so much thereof as may remain unsatisfied, plus the costs of the present suit.

The far reaching effects of this judgment are self-evident. As is well known, members of labor unions frequently own, jointly or in common, insurance and other funds, which are not the property of the organization itself, but could be reached directly by an execution issued under this and similar judgments. But the scope of this judgment goes far beyond that, in that it creates a situation similar to the one which resulted from the judgment in the famous *Danbury Hatters* case, except that in that case the liability was predicated upon evidence which this Court held sufficient to prove actual participation or at least approval of the action of the organization in conducting a secondary boycott which was the ground of recovery in that suit. (*Lawlor* v. *Loewe*, 235 U. S. 522.)

It is argued, however, that the Union and its members have only themselves to blame by entrusting their faith to an arbitrator. This brings us to a consideration of the provisions of the Arbitration Law of the State of New

York, as interpreted by its highest Court, and the questions of the meaning of a collective bargaining agreement as interpreted by the Courts of the State of New York and this Court.

POINT II

The New York Arbitration Law as interpreted by its highest Court.

The discussion begins with the fact that the New York courts recognized, as they must, that a person cannot be muleted in damages except by due process of law, which, ordinarily, means a trial in the regular courts; and in a case like the present one after a trial by jury. The Arbitration Law of the State of New York therefore proceeds upon the theory that the power of an arbitrator to award damages, and the power of the courts to give judgment thereon, stems from an agreement by the party proceeded against to waive trial in the regular courts and to submit himself to the jurisdiction of the arbitrator. In passing upon the problem of the constitutionality of any arbitration law, Chief Judge Cardozo, speaking for the unanimous Court of Appeals of the State of New York, said:

> "Arbitration presupposes the existence of a contract to arbitrate. If a party to a controversy denies the existence of the contract and with it the jurisdiction of the irregular tribunal, the regular courts of justice must be open to him at some stage for the determination of the issue. The right to such a determination, either at the beginning or at the end of the arbitration or in resistance to an attempted enforcement of the award is assured by the Constitution as part of its assurance of due process of law."
>
> *Finsilver* v. *Goldberg*, 253 N. Y. 382, 389.

Proceeding upon this principle which is basic in our jurisprudence, and with a view to make the existence of a contract to arbitrate independent of oral testimony, Sec-

tion 1449 of the Civil Practice Act of the State of New York provides:

> "A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent."

The New York Court of Appeals also recognized another principle embodied in our law as applicable to arbitration—namely, that of due notice at all stages of the proceeding, and particularly the requirement of the kind of notice of a demand for arbitration that would give the party proceeded against an opportunity to contest the existence of any agreement to arbitrate or the right of the opposite party to proceed to arbitration under that agreement.

In 1939 the Court of Appeals declared unconstitutional the provisions of the arbitration law of this State which offended this basic principle. In delivering the unanimous opinion of the Court of Appeals in that case, Chief Judge Crane said:

> "Section 1458 of the Civil Practice Act simply says a notice shall be personally served of an intention to conduct an arbitration, pursuant to the provisions of a contract. It does not give the form of the notice nor require time and place and consequence of a default to be stated, nor that the notice should tell what should or must be done. A mere letter from a lawyer saying he demands arbitration of a contract before some board seems to be sufficient—nothing more. And the consequence? If the party does not proceed to get out a stay within ten days no court of equity nor any other court can afford him any relief, and all this in face of the fact that he never made any contract to arbitrate. * * *
>
> This is no way to conduct a proveeding resulting in a money judgment. The notice should state where and at what time the party is to proceed and the consequences of his failure to act as the law specifies. We

do not say that all of these things are necessary, but we do say that the proceedings for arbitration cannot be left so vague and uncertain that people may be muleted in judgment without being sufficiently warned of their rights."

Schafran v. *Lowenstein*, 280 N. Y. 164, 171-172.

After the decision in that case the section of the New York Arbitration Law thus criticized was amended to read as follows in its present form:

"Enforceability of award in certain cases.

An award shall be valid and enforceable according to its terms and under the provisions of this article, without previous adjudication of the existence of a submission or contract to arbitrate, subject, nevertheless, to the provisions of this section:

1. A party who has participated in the selection of the arbitrators or in any of the proceedings had before them may object to the confirmation of the award only on one or more of the grounds specified in subdivisions one, two, three and four of section fourteen hundred sixty-two and in section fourteen hundred sixty-two-a or (provided that he did not continue with the arbitration with notice of the facts or defects upon which his objection is based) because of a failure to comply with subdivision one of section fourteen hundred fifty-four or with section fourteen hundred fifty-five or because of the improper manner of the selection of the arbitrators.

2. A party who has not participated in the selection of the arbitrators or in any of the proceedings had before them and who has not made or been served with an application to compel arbitration under section fourteen hundred fifty may also put in issue the making of the contract or submission or the failure to comply therewith, either by a motion for a stay of the arbitration or in opposition to the confirmation of the award. If a notice shall have been personally served upon such party of an intention to conduct the arbitration pursuant to the provisions of a contract or submission specified in such notice, then the issues

specified in this subdivision may be raised only by a motion for a stay of the arbitration, notice of which motion must be served within ten days after the service of the notice of intention to arbitrate. Such notice must state in substance that unless within ten days after its service, the party served therewith shall serve a notice of motion to stay the arbitration, he shall thereafter be barred from putting in issue the making of the contract or submission *or the failure to comply therewith*. The arbitration hearing shall be adjourned upon service of such notice pending the determination of the motion. Where such opposing party, either on a motion for a stay or in opposition to the confirmation of an award, sets forth evidentiary facts raising a substantial issue as to the making of the contract or submission *or the failure to comply therewith*, an immediate trial of the same shall be had, and such party shall have the right to demand a jury trial provided such demand is served with his affidavits. In the event that such party is unsuccessful, he may, nevertheless, participate in the arbitration if the same is still being carried on."

Section 1462-a referred to in the above section deals with matters not involved in this case. Section 1462, in so far as material in this case, reads as follows:

"Motion to vacate award.

In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourten hundred fifty-eight * * *."

We thus start with two basic principles. The requirement of an agreement waiving the right to trial in the regular courts, and by jury in the case of a money judgment, and the requirement of proper notice of a demand for arbitration which would give the party proceeded against an opportunity to contest the existence of the agreement, or the right of the party seeking arbitration to proceed to arbitration under the terms of the agreement.

Bearing those principles in mind, we may now proceed to consider the situation in the case which resulted in the judgment sought to be reviewed. This requires consideration of two questions: 1) the question of due process as it affects Local 807 and its property; and 2) the question of due process as it affects the individual members of Local 807 and their property, both individual property and the property held by them jointly or in common. We shall consider these questions separately.

POINT III

The judgment sought to be reviewed deprives Local 807 of property without due process of law.

The question of due process as it affects Local 807 presents three distinct questions:

1) The question of substantive law,—whether Local 807 made an agreement waiving trial by jury of the right to have its property rights adjudicated in the

regular courts, and agreed to abide by the decision of Mr. Hugh E. Sheridan as arbitrator.

2) Whether Local 807 has been accorded procedural due process in the conduct of the alleged arbitration.

3) Whether Local 807 has been accorded due process in the court proceedings upon the alleged award.

A. Local 807 never agreed to have Hugh E. Sheridan act as arbitrator between itself and Motor Haulage after August 31, 1946.

We respectfully submit that the record conclusively proves that Local 807 never agreed to have Hugh E. Sheridan act as arbitrator in its dispute with Motor Haulage (or in any of its disputes for that matter) after August 31, 1946. It was entitled to have this question litigated at some time, either before the alleged arbitration or upon the motion to confirm.

In this connection four facts are of crucial importance:

1) The collective bargaining agreement between Motor Haulage and Local 807 (146-186), which is the basis of its claimed right to arbitration, does not mention Hugh E. Sheridan. Instead it provides that arbitration should be had, if at all, before "the Arbitration Authority for the Trucking Industry of the City of New York" (162-163).

2) Concededly, the "Arbitration Authority" thus appointed as the tribunal before which disputes between Motor Haulage and Local 807 should be arbitrated, ceased to exist on August 31, 1946, and, concededly also, after the lapsing of the "Authority" on August 31, 1946, Local 807 had specifically instructed its officers not to consent to its revival if the employers insisted that Hugh E. Sheridan be renamed as Impartial Chairman (303, 305-306). Clearly, therefore, the Union did not participate in the appointment of Mr. Hugh E. Sheridan as arbitrator after August 31, 1946.

3) The agreement setting up the "Arbitration Authority", which was expressly adopted by reference in the collective bargaining agreement between Motor Haulage and Local 807 contained certain specific limitations upon the right to demand arbitration, by way of conditions precedent, which that agreement specifically provided could not be waived by the Union (187-188).

4) Some of these conditions precedent, at least, were indisputably not complied with,—namely, the provision that a demand for arbitration by the employer must be signed by a "duly authorized executive official of the Employer", and that the demand must be made "on forms prescribed by the Impartial Chairman". (Article 5 of Supplemental Agreement ("Green Book") quoted in full in the petition.)

We take it that it does not require the citation of authority to establish that an agreement to arbitrate which contains conditions precedent to the right to arbitrate is not an agreement to arbitrate when the conditions precedent have not been complied with. And since the record conclusively proves that those two conditions have not been complied with, there never was an agreement to arbitration as a matter of law. The arbitrator, therefore, had no jurisdiction to arbitrate the dispute, and the judgment based upon his "award" is therefore clearly lacking in due process.

This would be so even if the so-called "Arbitration Authority" had still been in existence, and Mr. Hugh E. Sheridan, still its Impartial Chairman, at the time when the alleged arbitration took place. But there was no Arbitration Authority on November 26, 1946. And since Hugh E. Sheridan personally was never appointed arbitrator by the collective bargaining agreement between Motor Haulage and Local 807, it is clear that he had no jurisdiction whatever in the premises, and his alleged award was utterly void, and the judgment based thereon clearly lacking in due process.

It is unnecessary to inquire here whether Motor Haulage was entitled, under certain provisions of the New York Arbitration Law, to have an arbitrator appointed by the Court to arbitrate a dispute which had arisen while the agreement was in effect but which could not be arbitrated before the tribunal appointed by the collective bargaining agreement because its existence had lapsed. It may well be argued that the agreement to arbitrate was conditioned upon the existence of the tribunal which was made the forum in which the dispute should be arbitrated. It is a sufficient answer that no application was made by Motor Haulage to the Supreme Court either to compel arbitration or to appoint an arbitrator if the Court should consider that the right to arbitration had survived the lapsing of the tribunal named as arbitrator.

B. Local 807 was not accorded due process in the conduct of the alleged arbitration.

Local 807 strenuously denied before the Courts below that there had ever been an "arbitration". That it did not present any evidence is conceded. If there was any "hearing" at all, it could only have been a hearing of one side. And it must be conceded that the letter of November 18, 1946, from Sheridan to the Union,—the only notice that an "arbitration" was impending,—falls woefully short of the requirements of such a notice as laid down by the Court of Appeals in the *Schafran* case, and that it did not give the Union sufficient time to do anything by way of preventing this alleged "arbitration" to proceed. Clearly, all of the strictures contained in the decision of the Court of Appeals in the *Schafran* case upon the provisions of former Section 1458 of the Civil Practice Act, condemned as unconstitutional for lack of due process both under the Federal and New York State Constitutions, apply with much greater force to the procedure approved by it in this case, as a comparison of the two procedures will easily demonstrate.

C. Local 807 was not accorded due process in the New York Courts.

We respectfully submit that Local 807 was not accorded due process in conformity with the requirements of New York Law when sued under the provisions of Section 13 of the General Associations Law.

Concededly, neither the two officers of Local 807 who are named in the judgment sought to be reviewed, and the only ones upon whom service could be made under the provisions of Section 13 of the General Associations Law of New York, was ever served with due process. In fact, no officer of the Union was ever served with process. *Nor was any process ever addressed to the Union either under the provisions of Section 13 of the General Associations Law or otherwise at any stage of the proceedings in the New York Courts.* Instead, the motion to confirm was addressed to a firm of attorneys who concededly had not appeared or in any way participated in the alleged arbitration; and the motion to amend the proceedings by substituting John Strong as President and Thomas Hickey as Treasurer of Local 807 in the place and stead of the respondent named in the motion to confirm and the original judgment entered upon such confirmation was also addressed to the same attorneys, the notice of motion being entitled in the old proceeding; and the motion addressed to the attorneys not as attorneys for John Strong and Thomas Hickey, or either of them, but as attorneys for the original respondent, Local 807 (26, 33).

This procedure is sought to be justified by Section 1461 of the Civil Practice Act which provides that notice of motion to confirm an award "must be served upon the adverse party or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court." Although it is obvious that this provision refers only to an attorney who *has appeared in the proceeding,* this Court is bound by the interpretation of the Court of Appeals that the words "his attorney" means

an attorney generally known to be the attorney for the "adverse party" even though he has never appeared in *this* proceeding. And we do not stop to inquire whether such a proceeding is due process under the Fourteenth Amendment, in so far as the original proceeding is concerned,—that is to say, the proceeding against Local 807, as such, in its motion which resulted in the judgment reversed by the Court of Appeals.

The situation is, however, entirely different in the new proceeding which resulted in the judgment sought to be reviewed.

It is the settled law of the State of New York that the officer named in an action against an unincorporated association *is the party in the action* with respect to all questions of service, venue, and other questions of jurisdiction. The record shows that the firm of attorneys upon whom the notice of motion to confirm and the notice of motion to amend the proceeding by substituting John Strong and Thomas Hickey as parties in place of the parties originally named, had been served, not only had not appeared in the so-called arbitration proceeding, but were not the attorneys for either John Strong or Thomas Hickey, personally, even though they had acted as attorneys for the Union as such in other matters.

The New York Law with respect to the question as to who is the real party in an action or proceeding by or against a voluntary association sued under the provisions of the General Association Law is indicated by the following cases, which show a uniform construction of these statutory provisions from the first enactment to the present day:

Bacon v. *Dinsmore,* 42 How. Prac. 368;
Brooks v. *Dinsmore,* 8 N. Y. Suppl. 103;
Hanke v. *Cigar Makers International Union,* 27 Misc. 529;
Mason v. *Homes,* 30 Misc. 719;
New York Electrical Contractors Association, Inc. v. *Local 3,* 176 Misc. 991.

In the first case cited, a resident of Massachusetts, who was the president of an unincorporated association having its place of business in Brooklyn, N. Y., brought suit on behalf of his association against the president of another unincorporated association who was a resident of New York City. The question was one of venue; and that question depended on the decision of the question as to who were the parties before the Court,—the associations or their presidents. The General Term of the Supreme Court held that the presidents were the real parties before the Court, and that the case was therefore improperly brought at the place of business of the plaintiff association. In its opinion, the Court said:

> "The defendant has a legal right to have the place of trial changed to New York, if the persons named as plaintiff or defendant are the parties to the action. The Court has no discretion about it.
>
> We think they are parties. The associations which they represent, clearly are not, nor could they be made parties, inasmuch as they have no legal capacity to sue, or to be sued. Such associations are not corporations, but are mere partnerships. But for the statute authorizing suits to be brought by and against them in the name of officers thereof, all the partners would have to be joined as plaintiffs and defendants. Suits may still be brought by such associations although, when sued, it must, in the first instance, be in the name of the President or Treasurer. The partners are not parties because they are not named on the record.
>
> It is not even known how many or who they are. The parties named are, therefore, the parties in a legal sense. It is true, the suit is carried on for others who are beneficially interested with the nominal parties that that is the case, when the action is brought by the trustee of an express trust, by an agent contracting in his own name without disclosing his principals, as where the contract is made for an unknown principal, by executors and administrators and the like cases. And yet, it is clear, that such beneficiaries are not parties to such action."

Bacon v. *Dinsmore*, 42 How. Prac. 368, 377.

The second case cited involved a suit against the same unincorporated association, and was brought in a district court of the City of New York in which the defendant association had its place of business, but neither its president nor the plaintiff were residents of that district. Under the statute governing jurisdiction of the district courts of the City of New York, the district court had no jurisdiction unless one of the parties was a resident of the district. The question of jurisdiction, therefore, depended on whether the party defendant to the suit was the association or its president. Again the General Term decided that it was the president and not the association that was the party defendant, and that, therefore, the district court was without jurisdiction, and ordered the complaint dismissed. In its opinion in that case, the Court said:

> "The question therefore is, who is the 'party' defendant,—the president or the company? And this has been repeatedly decided to be the president. *Woods* v. *De Figaniere,* 1 Rob. (N. Y.) 607, which is directly upon the point. This was followed in *McGuffin* v. *Dinsmore,* 4 Abb. N. C. 241, in which case in delivering his opinion, Sanford, J., says:
>
> 'The conclusions at which I have arrived after a careful examination of the papers submitted are
>
> (1) that William B. Dinsmore is the only "party" defendant in this action, notwithstanding that he is sued in his representative capacity, as president of an association consisting of numerous individuals.'"
>
> *Brooks* v. *Dinsmore,* 8 N. Y. Supp. 103-4.

In the last case cited, the Court said:

> "When the association is named as defendant, without joining the individual members, there is no one before the court who is capable of being sued. * * *"
>
> *New York Electrical Contractors' Association* v. *Local Union No. 3,* 176 Misc. 991, 992.

It has therefore been repeatedly held by the Courts that in an action brought against an unincorporated association under the provisions of Section 13 of the General Associations Law service must be made on the officer named personally, otherwise the Court acquires no jurisdiction.

Andrews v. *Local Union 13*, 133 Misc. 899;
Hagan v. *Bricklayers, etc.*, 143 Misc. 591;
N. Y. Elect. Contractors' Association v. *Local Union 3*, 176 Misc. 991;
Amon v. *Moreschi*, 296 N. Y. 395.

To which should be added the fact that in its opinion reversing the judgment entered in the proceeding against the Union in its common name, the Court of Appeals simply held that, *where service has actually been made upon an officer* who could be made the party defendant under the provisions of Section 13 of the General Associations Law, the failure to insert his name may be disregarded as an irregularity which could be amended if no injustice would ensue therefrom. Service upon the officer who could be sued under Section 13 was therefore made the essential condition of such amendment, and the Court recognized the fact that without such service there was no due process under New York law. This becomes even clearer when we examine the case upon which the Court of Appeals relied as authority for its holding.

In that case an action was brought against an unincorporated association in its common name, but process was actually served upon a person who, the plaintiff claimed, was the treasurer of the association,—the treasurer being one of the two officers who could be sued under the provisions of Section 13 of the General Associations Law. Thereafter, the plaintiff made a motion to amend the process by substituting the treasurer, as treasurer, as the party defendant instead of the association as such. The Court at Special Term denied a motion. In reversing the order denying the motion, the Appellate Division, Second De-

partment, *did not order the motion granted but remitted the case to the Special Term for the purpose of ascertaining* whether or not the person actually served, and claimed to be the treasurer of the association, was actually such treasurer at the time the service was made upon him.

Yeager v. *Cooperative Fire Underwriters Assn.*, 243 App. Div. 743.

We therefore have the following situation:

Under New York law John Strong and Thomas Hickey are the real parties defendant in this case.

Concededly, neither of them was served with process at any time.

Concededly, they never appeared personally or by attorney until after the judgment sought to be reviewed was made and entered.

Concededly, the only process ever served was a notice of motion directed to and served upon a firm of attorneys who had not appeared in the alleged arbitration proceedings nor were they the attorneys for either Strong or Hickey,—at least not until after the judgment sought to be reviewed was made and entered, and then only to vainly appeal from that judgment.

We respectfully submit that this is clearly not due process, and that if the quoted provisions of Section 1461 of the New York Civil Practice Act permit this procedure then those provisions are clearly unconstitutional as a violation of the due process clause of the Fourteenth Amendment.

POINT IV

The judgment sought to be reviewed deprives the individual petitioners and the other members of Local 807 of property without due process of law.

When we turn from a consideration of the judgment sought to be reviewed as it affects Local 807 to a considera-

tion of that judgment as it affects the individual petitioners, the situation becomes almost fantastic in the utter disregard of procedural as well as substantive due process.

We have already shown that the judgment sought to be reviewed is actually a judgment not only against John Strong and Thomas Hickey in their representative capacity,—that is to say, against Local 807,—but against these two individually as well as against the other individual petitioners, who are merely three out of more than 10,000 members of Local 807 whom the judgment directly affects,—immediately in so far as any property which they may own in common, and *mediately* by means of a further step with respect to their own property. But——

Concededly, the individual members of the Union were not either summoned or proceeded against in the alleged arbitration held by Mr. Hugh E. Sheridan, *and his award does not run against them.*

Concededly, also, neither John Strong and Thomas Hickey, individually, nor, of course, the other three petitioners herein and the other more than 10,000 members of Local 807, have ever been summoned in any way or served with any notice to appear in the Supreme Court of the State of New York to show cause why Mr. Sheridan's alleged award should not be confirmed, or why any judgment may not be entered against them under which execution might be levied against their common property, or why they should be adjudged liable for the damages claimed to have been sustained by Motor Haulage because of the rebellious conduct of some of their fellow members in flouting the authority of the Union and its officers.

Concededly, also, no process or notice of any kind was ever served either in the alleged arbitration proceeding or in the Supreme Court of the State of New York on any attorney for the individual members of the Union, the very existence of the three individual petitioners, other than John Strong and Thomas Hickey, being utterly unknown to the firm of attorneys upon whom the two notices

of motion were served, until long after the judgment sought to be reviewed was made, entered, and affirmed,—and that goes for practically all of the more than 10,000 members of Local 807.

So much for the procedural aspects of due process involved in this case. And the situation is no less fantastic when we turn to the substantive aspects of due process,—the right of the individual petitioners and their fellow members not to be mulcted in damages except after a trial, by jury, in the regular courts of the State of New York.

As we have seen, the basis of the power of any court to enforce an award of an arbitrator is an agreement by the party proceeded against to substitute, in the first instance, judgment of the arbitrator for a judgment of the court. The basic question, therefore, is: *Have the individual petitioners and the other members of Local 807, individually, made an agreement with Motor Haulage to arbitrate any disputes before Hugh E. Sheridan, or any other arbitrator or arbitration tribunal?*

In saying that that is the basic question we have disregarded, for the time being, the equally important question: *Was there any dispute to be arbitrated between these individuals and Motor Haulage?* This latter problem is part of, and may be therefore postponed to, the discussion, further below, of the nature of the "dispute" and of the "award" which is the basis of the judgment sought to be reviewed.

Limiting ourselves, therefore, to the question whether there was any agreement to arbitrate, we respectfully submit that the answer to the question must be an emphatic "No".

It is elementary that an agreement involves a meeting of the minds of the parties on the question which is the subject of the agreement. The question, therefore, is: Were the individual members of Local 807 parties to any agreement with Motor Haulage, and if so, what was the agreement?

In answering that question we must start out with the fact that both, under the law of the State of New York and under the Federal law, a collective bargaining agreement such as that between Motor Haulage and Local 807 under which arbitration was claimed, is not an employment agreement, and is no kind of agreement between *all* the members of the collective bargaining unit represented by the collective bargaining representative and the employer who is a party to the collective bargaining agreement. Both the law of New York and the Federal laws administered by this Court recognize the fact that the collective bargaining agreement is separate and distinct from the employment agreement under which employees of the employer-party to the collective bargaining agreement actually work, even though they work under the provisions of the collective bargaining agreement. This Court as said in the *J. I. Case Co.* v. *NLRB*, 321 U. S. 332:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."
>
> *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 334-335.

To the same effect, *Medo Photo Supply Corp.* v. *NLRB,* 321 U. S. 678. And such is also the law of the State of New York:

Gulla v. *Barton,* 164 App. Div. 293.

In that case, the New York Court said:

> "It, (i. e., the collective bargaining agreement) was a contract made by his representative for his benefit, and its validity is not affected by the independent agreement, express or implied, between him and defendant. *The contracts are concurrent* and neither one destroys the other."
>
> *Gulla* v. *Barton,* 164 App. Div. 293, 295.

Clearly, therefore, there was no agreement of any kind between the individual petitioners and the rest of the members of Local 807, other than those who accepted employment from Motor Haulage under the collective bargaining agreement. And, *a fortiori,* the members could not have been bound to any agreement of arbitration, as the result of the collective bargaining agreement between Local 807 and Motor Haulage, because of the specific provisions of the arbitration statute quoted above which provide that such an agreement must be signed by the party to be charged or his lawful agent. It would be preposterous to claim that the special authority given to the collective bargaining representative of a collective bargaining unit to negotiate terms and conditions of employment with a particular employer makes the collective bargaining representative the agent of each and every member of the Union to make agreements on his behalf with others than his own employer or relating to anything but his employment. Indeed, the New York courts have specifically held that a Union is not the agent of the employees covered by the collective bargaining agreement.

Rotnofsky v. *Capital Distributors Corp.,* 262 App. Div. 521.

The last case cited specifically held that the Union is not the agent of the employees employed under a collective bargaining agreement. In the course of its opinion in that case, the Appellate Division of the New York Supreme Court said:

> "At Special Term, and on this appeal, plaintiff's contentions were two-fold: first, he claimed that the union acted as his agent in making the written contract, and, second, he claimed that by hiring plaintiff defendant adopted stipulations contained in the agreement between itself and the union as the terms of a separate contract between plaintiff and defendant.
>
> It is plain that neither of these propositions is legally correct. On its fact, the contract shows that it was not one made by the labor union as agent for the plaintiff, but one made by it as principal for the purpose of creating rights in the union as a separate legal entity."

And this Court has recognized the special character of a collective bargaining representative, who, according to the holding of this agreement, is not the agent of the workers whose agreements are binding upon them, but rather a trustee exercising public functions, whose powers extend only *to the proper exercise of those functions.*

Steele v. *Louisville & N. R. Co.*, 323 U. S. 192.

Nor is that all.

We have already pointed to the fact that the record proves beyond dispute that Motor Haulage failed to comply with some of the provisions of the agreement which were conditions precedent to its right to demand arbitration. Neither of the New York courts which sustained the Motor Haulage's right of recovery, in their brief opinions, referred to this subject. We do not, therefore, know the reasons which actuated those decisions. We do know that counsel for Motor Haulage argued that these conditions had been "waived"; and we may assume that the

New York courts, which permitted the recovery, sustained that condition, even though the agreement specifically provided that the Union could not waive those provisions. The question of waiver is, however, on one level when the Union as such is considered, which was the situation when the Appellate Division and Court of Appeals wrote their opinions, and on an entirely different level when the question arose under the judgment sought to be reviewed here.

The Union clearly cannot, either by virtue of its own collective interest or by virtue of the interest of the particular workers involved in the particular dispute, sacrifice the rights of the other members of the Union by making an agreement to deprive them of basic constitutional rights in an effort to settle a particular controversy in which it is particularly interested. Clearly, Local 807 had no power to make an agreement exposing all of its members to liability for the acts of a comparatively small number of its members, even if it had a mind to do so. And if it had no power to make such an agreement expressly, it could not do so impliedly by its behavior by "participating" in any such arbitration, or doing anything which would sacrifice the basic constitutional rights of its members under the particular provisions of the New York Arbitration Law, or in any other manner whatsoever.

POINT V

Petitioners were deprived of due process of law and of the equal protection of the laws in that they were deprived of the safeguards which every legal system, including the laws of the State of New York, provide against arbitrary, prejudiced, and corrupt judgments.

Every civilized legal system provides safeguards against judgments which are the result of corruption, bias or prejudice. As we have seen, the New York Arbitration

Law specifically provides that an arbitrator's award must be vacated by the Court

> "1. Where the award was procured by corruption, fraud or other undue means.
>
> 2. Where there was evident partiality or corruption in the arbitrators or either of them."

The affidavits submitted in opposition to the motion to confirm specifically charged that the so-called "award" was a vengeful act on the part of the so-called arbitrator in retaliation for the refusal of Local 807 to revive the "Arbitration Authority", with Mr. Hugh E. Sheridan as arbitrator, as the result of a vote taken by the membership of Local 807 on November 12, 1946. The timing of the notices of hearing sent by Sheridan to Local 807; the interpolation by him of the word "arbitration" into the letter of "complaint" of the employers' association of May 31, 1946; the disregard by the arbitrator of the specific provisions of the agreement setting up the Arbitration Authority that a demand for arbitration could only be made by a "duly authorized executive official of the Employer" and only upon forms provided by the Impartial Chairman, and, finally, the nature of the award itself which led the Justice at Special Term to refuse its confirmation strongly,—if not conclusively,—prove the charge. At any rate, it was specifically made,—and was never denied either by the so-called "arbitrator" himself, by Mr. Adelizzi, specifically named as co-conspirator with him, or anyone else on behalf of the employer. *This charge was never tried by the Supreme Court of the State of New York.* As already pointed out, there was no occasion for the Justice at Special Term who refused confirmation because of the nature of the award, to inquire into the question of the motives which prompted it. But when the Appellate Division and the Court of Appeals concluded that the Justice at Special Term had no right to inquire into the nature of the award, it clearly became

the duty of the New York Courts to inquire into the charges made by Local 807 as to the motives which prompted it. The refusal of the New York Courts to do so clearly deprived the petitioners of due process of law under the general principles underlying our legal system and protected by the due process and equal protection clauses of the Fourteenth Amendment.

It is unnecessary to inquire here as to whether the New York Courts by the decision complained of intended to generally abolish the protection provided by the statutory provisions quoted above, or intended to create a distinction between arbitrations engaged in by business men among themselves and an arbitration between an employer and a labor union. In any event, the decision sought to be reviewed is contrary to the provisions of the Fourteenth Amendment.

POINT VI

In holding that there was a dispute to be arbitrated and that the alleged arbitrator was in power to make the award in question, the decision sought to be reviewed clearly deprives the petitioners of the equal protection of the laws.

We respectfully submit that it is sufficient to read the excerpts from the award quoted in the petition to demonstrate beyond the possibility of a doubt that the so-called arbitrator intended to impose upon Local 807, *because of its character as a labor union,* a liability which he would not have imposed (and which under our law *he could not* impose) if the party proceeded against were a business organization instead of a labor union. This, we respectfully submit, is clearly violative of the equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution. And this discrimination against workmen as a class has become particularly aggravated by the judgment sought to be appealed from,

which extended the liability, obviously intended to be applicable only to Local 807 as a collective entity, to all of its members individually. For this not only differentiates between labor unions and business corporations by imposing upon the former a harsher rule of liability, but it makes the members of a labor union individually responsible for the acts of the organization while leaving the stockholders of a corporation free of responsibility.

The only opinion vouchsafed by the New York Courts as the legal basis for the judgment sought to be reviewed is the brief opinion of the Appellate Division, reversing the decision of the Special Term on the ground that the Courts will not refuse to confirm an award of an arbitrator because it was contrary to law or fact. We respectfully submit that this statement is not in accord with any of the decisions of the New York Courts rendered prior to the present case, and that it has never been applied either before or since in cases of arbitration between business men, *or where such a rule of law would have hurt business men in their disputes with labor unions.*

In support of the broad law rule laid down by the Appellate Division in this case, that Court cited two cases,—one in the Court of Appeals and one in its own Court. But a glance at those two cases will clearly demonstrate that they did not warrant the holding that an arbitrator may arrogate to himself to decide that there was a dispute where there actually was none within the terms of the agreement, the alleged breach of which is the basis of the demand for arbitration, or may mulct a party in damages where he clearly was not guilty of any breach of any agreement.

In the case in the Court of Appeals (*Matter of Wilkins,* 169 N. Y. 494), only one question, a question of law, was submitted to the arbitrator, and it was submitted, as pointed out by the Court of Appeals, to an eminent lawyer,—presumably because it was a question of law. Under such circumstances the losing party could not, as the Court

of Appeals pointed out, be heard to complain of the erroneous decision of the legal question. Clearly, therefore, the *Wilkins* case is no authority whatever on the questions presented by the case at bar.

Nor was the situation any different in the case in the Appellate Division, *Matter of Delma Engineering Corp.*, 267 App. Div. 410. It is true that in that case there was an agreement to arbitrate future disputes; but the particular disputes involved in that case were submitted by special submission which specifically stated the questions to be decided,—including the question of law. Again, since a specific question of law was submitted to arbitration, the losing party could not appeal from the decision of the Court selected by himself. Accordingly, the Court held that the arbitrator's decision could not be upset because of the error of law complained of. As the Court said in its opinion:

> "If Johnson, under the terms of its subcontract with Delma, believed that the latter was entitled only to the unit prices therein specified and not to the additional fifteen percent allowance as provided in the general contract between Johnson and the owner, it might have refused to agree to have such a question submitted to arbitration upon the theory that, as to item (b) there was nothing to arbitrate. Instead, however, when the dispute arose, it entered into a written covenant with Delma, signed and acknowledged, in which it was stated 'We do hereby agree to submit such controversy for decision to arbitrators consisting of the following: * * *
>
> Having thus solemnly stipulated in writing to submit this very question, now that such question has been decided adversely to it, Johnson argues that the award of the arbitrators as to item (b) is contrary to law. If the arbitrators were not authorized to determine item (b) as well as item (a), then the agreement for arbitration and the memorandum of submission were wholly without meaning. * * *"
>
> *Matter of Delma Engineering Corp.*, 267 App. Div. 410, 413-414.

With these two cases out of the way we may now turn to the law of New York as generally laid down by its courts, and the constitutional questions presented by the failure to apply that general law to the case at bar.

An examination of the New York cases on this subject will show that the question has come up in two different forms,—either as a question as to whether there was a dispute to be arbitrated within the terms of the agreement providing for arbitration, or as a question of the power of the arbitrator to render the kind of an award which was sought to be enforced. The general principles underlying the question were laid down in the comparatively early case of *Halstead* v. *Seaman*, decided by the Court of Appeals in 1880. In that case, the Court of Appeals said:

> "The case must turn upon the correctness of the arbitrator's construction of the submission. On this point, the decision of the arbitrators is not conclusive. No such question was submitted to them. It is for the court to judge whether arbitrators have exceeded their powers or refused to exercise them. The general rule that their decisions are not reviewable on the mere ground that they are erroneous, is applicable only to their decisions on matters submitted to them. The submission is the foundation of their jurisdiction, and they are not the exclusive judges of their own powers."
>
> *Halstead* v. *Seaman*, 82 N. Y. 27, 32.

The principle thus laid down was reaffirmed in the case of *Dodds* v. *Hakes*, decided in 1889, in which the Court of Appeals cited its language quoted above from *Halstead* v. *Seaman* on the question of jurisdiction, and then added:

> "They cannot decide their own jurisdiction nor take upon themselves authority by deciding that they have it, but must, in fact, have it under the agreement of the parties whose differences are submitted to them, before their award can have validity, and the fact of jurisdiction, when their decision is challenged, is always open to inquiry."
>
> *Dodds* v. *Hakes*, 114 N. Y. 260, 264.

The Court then proceeded to consider the objection that the award applied the wrong rule of damages. The defendant had leased a store to the plaintiff but was unable to give possession. The dispute was submitted to arbitration and the arbitrator awarded a sum which included consequential damages. In holding that the arbitrator was without power to make such an award the Court said:

> "An arbitration, like all other agreements, must be construed and interpreted with reference to the intent of the parties, so far as such intent is consistent with the language of the contract.
>
> The term damages is one of very broad meaning, but, applied to contracts, it is limited to such as may be supposed to have entered into the contemplation of the parties, and flow naturally from the violation of the agreement, and are certain in their nature, having respect to the cause from which they proceed; and speculative profits and accidental and consequential losses are not recoverable. (*Cassidy* v. *Le Fevre*, 45 N. Y. 562; *Hamilton* v. *McPherson*, 28 id. 72.) We think the loss of business which plaintiff might have sustained from being deprived of the opportunity to occupy the store in question was not within the terms of the submission. The rule in all cases when damages are claimed solely from the failure of the lessor to give the lessee possession of the leased property is well settled, and limits the plaintiff's recovery to an amount represented by the excess of the actual rental value over the rent reserved in the lease. (*Trul* v. *Granger*, 8 N. Y. 115; *Pumpelly* v. *Phelps*, 40 id. 60.) *In the use of the term 'damages', therefore, in the submission as applied to the contract in question, we think the parties must be deemed to have intended that rule or measure of recovery, which the law applies in analogous cases.* The decision included matters not submitted to the arbitrators and the whole award was void."
>
> *Dodds* v. *Hakes*, 114 N. Y. 260, 265.

The rule that an arbitrator has no right to give consequential damages where the law would not give the same,

was applied by the Court of Appeals in 1929 in an opinion written by Chief Judge Cardozo.

> *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284.

The two cases thus far cited involved disputes between businessmen with respect to ordinary business transactions. We may now turn to three very recent cases decided by the Court of Appeals in which business corporations appealed to the courts for a narrow construction of the powers of an arbitrator, and were sustained by the Court of Appeals. In the first of these cases, decided in 1946, a labor union sought arbitration with an employer under a collective bargaining agreement which provided that new employees of the employer were to become members of the union, and that any disputes arising out of this provision were to be arbitrated. At the time of the making of the agreement the employer was engaged in business in New York. Thereafter, he established a new plant in New Jersey, and the question was whether the employees of the new plant came within the provisions of the agreement with respect to new employees. The union seeking arbitration, the employer applied to the Court for a stay. The Special Term denied the motion for a stay. The Appellate Division affirmed the decision of the Special Term. The Court of Appeals unanimously reversed the decision of the lower Courts,—holding that the construction of the agreement was for the Court, and that the Special Term should, therefore, have construed the meaning of the provision, instead of permitting the matter to go to arbitration, which would have left the construction of the meaning of this clause to the arbitrator. In its opinion the Court said *per curiam:*

> "Whether the appellant was bound to employ in its New Jersey plant members of the respondent union was a debatable question which called for a decision as to the scope of the collective bargaining agreement be-

tween the parties. This question, we think, was for the court, not for the arbitrators."

Matter of Belding Hemingway, Co., 295 N. Y. 541, 543.

In the second of these cases, decided in 1947, the Court of Appeals squarely held that *an arbitrator is without power to render an award which would be contrary to the clear terms of the agreement between the parties as such an agreement would be construed by a court of law.* Accordingly, the Court affirmed an order of the Appellate Division, First Department, which denied a motion to compel, and granted a motion to stay, an arbitration in which an award in favor of the party seeking arbitration would have been contrary to the terms of the agreement as construed by the Courts.

In that case the petitioner seeking arbitration, a labor union, and respondent opposing arbitration, an employer, had entered into a collective bargaining agreement covering employees at the employer's place of business. Article XIII of the agreement fixed the hourly rate of the wages of the employees, effective January 1, 1946, and also provided for payment of a 6% bonus on earnings from July 5, 1945 to December 27, 1945. This article further provided: "The Company agrees to meet with the union early in June, 1946, to discuss the payment of a bonus for the first six months of 1946." Article VIII of the same agreement set up a procedure whereby disputes as to the "meaning, performance, non-performance and application" of the provisions of the agreement could be adjusted, and if not settled, submitted to arbitration. In July, 1946, the parties had a meeting at which payment of a bonus was discussed. The employer refused to agree to pay a bonus for the first six months of 1946. The Union asserted that the agreement committed respondent to the payment of a bonus and the only question open was the amount. Upon failure of the parties to adjust

the dispute under Article VIII, the Union served a demand for arbitration. The employer moved for a stay of arbitration, and the Union moved to compel arbitration. The Special Term granted the Union's motion to compel arbitration, and denied the employer's motion for a stay. The Appellate Division reversed, saying in an opinion *per curiam:*

> "The clause of the agreement that 'The Company agrees to meet with the Union early in July 1946 to discuss payment of a bonus for the first six months of 1946' can only mean what it says, that the parties will *discuss* the subject. While the contract provides for arbitration of disputes as to the 'meaning, performance, non-performance or application' of its provisions, the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. It is for the court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the court must determine whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.
>
> The union does not contend that a discussion was not had here. It admits that there was a discussion as to *whether* a bonus should be paid, but takes the position that the contract provision meant that a bonus must be paid and that all there was to discuss was the amount of the bonus to be paid. Logically, the union then contends that in the absence of an agreement between the parties as to the amount of the bonus to be paid, the arbitrator shall determine the amount. In the last analysis that is what the union seeks and is the ultimate result of accepting the union's interpretation of the contract. The case, altogether frankly and fairly, has been presented in its actualities rather than in any academic aspects. The union does not seek any further discussion, but the payment of a bonus under an interpretation of the contract which would require a payment rather than

discussion of a payment and permit the arbitrator to order a payment in an amount to be determined by him. Unless the contract can possibly mean that the union contends for, there is no occasion for arbitration."

Matter of International Association of Machinists and Cutler-Hammer, Inc., 271 App. Div. 917, 918.

The Court of Appeals affirmed without opinion, two Judges dissenting. But the dissenting Judges did not disagree with the theory underlying the decision of the Appellate Division, or the decision of the Court of Appeals. They merely questioned whether the provision of the agreement, under the particular circumstances of the case, was so clear as to permit only one construction. This is clear from the dissenting opinion of Judge Fuld, in which he said:

"A claim may be 'so unconscionable or a defense so frivolous' as to justify the court in refusing to order the parties to proceed to arbitration (*Matter of Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 199, 202), but I do not so regard the claim here asserted."

Matter of International Association of Machinists and Cutler-Hammer, Inc., 297 N. Y. 519, 520.

On April 20, 1949,—the very day when the Court of Appeals made its decision declining to review the decision of the Appellate Division affirming the judgment sought to be reviewed, the Court of Appeals made a decision which conclusively proves that the New York Courts have two measures with respect to the powers of an arbitrator,—one in the case of which the power is exercised in *favor* of a labor union, and another when that power is exercised *against* a labor union, or among two business men or business organizations.

On that day it decided the case of *Matter of Western Union Telegraph Company*, 299 N. Y. 177. In that case,

a labor union entered into a collective bargaining agreement with Western Union, as employer, which provided that "there shall be no strikes or other stoppages of work during the life of this contract". The agreement also provided that any dispute "with respect to the application or interpretation of this contract" should be submitted to an arbitrator named in the agreement. A dispute arose between the Union and Western Union as employer because the members of the Union refused to handle what may be called "hot cargo",—that is to say, messages received from or designated for certain cable companies whose employees were on strike. There was no general strike or general stoppage. The arbitrator named in the agreement decided that the refusal by the employees in question to handle the "hot cargo" was not a "stoppage" within the meaning of the agreement,—basing his decision upon a custom of long standing in the industry. The Special Term of the Supreme Court confirmed the award, upon the application of the Union. This decision was reversed by the Appellate Division, and the Court of Appeals affirmed the decision of the Appellate Division, on the ground that the word "stoppage" had a definite legal meaning and that the arbitrator therefore had no right to take evidence as to the custom prevailing in the industry.

Without entering upon a discussion as to whether or not the word "stoppage" has such a clear and definite meaning as to preclude a court from admitting evidence as to the custom in the industry,—with respect to which parties are supposed to make their agreements,—it is sufficient to point to the fact that the Court of Appeals considered the arbitrator bound by the rules of law governing the admission of evidence with respect to the ascertainment of facts, as well as to be bound by the rules of law governing the interpretation of contracts. In the course of its opinion, the Court of Appeals said:

> "We know of no case where a court, in construing a contractual obligation expressed in language as

clear as is the clause here in controversy, has found it necessary to employ extrinsic means to ascertain a party's obligation thereunder. * * *

The modification of the contract here accomplished, being, as we believe, in excess of the arbitrator's authority as limited by the parties, serves to vitiate the award."

Matter of Western Union Telegraph Company, 299 N. Y. 177, 185.

Apparently it makes a difference whether the appeal to the agreement under which the arbitrator acts is made by Western Union or by a labor union. When the Western Union makes its appeal to the contract, the word "stoppage" assumes so definite a meaning as to include workers who continue on the job but refuse to handle a particular kind of cargo; but when a labor union and its members make the appeal to the Courts, a contract whereby the Union merely undertakes not to *call* or *enforce* a strike or walkout is turned into an undertaking that rebellious members will not engage in a stoppage; and the Union is held liable in damages for acts which the members of the Union had no means of preventing and which the officials of the Union did their level best to prevent.

We respectfully submit that the Fourteenth Amendment makes the biblical injunction against having two measures a constitutional principle applicable to the case at bar.

POINT VII

Petitioners have been denied the equal protection of the laws in that the judgment sought to be reviewed has denied them the protection of subdivision 6 of Section 876-a of the New York Civil Practice Act.

We respectfully submit that the State of New York has denied the petitioners the equal protection of the laws in that the judgment sought to be reviewed imposes upon

them liability contrary to the express provisions of subdivision 6 of Section 876-a of the New York Civil Practice Act. That section reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) *actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.*"

Not only was no such *participation* or *ratification* either by the individual members made liable under the judgment sought to be reviewed or the organization itself, but the undisputed facts established beyond a doubt that the actions of the rebellious employees of Motor Haulage in staging the stoppage in question herein were acting *contrary* to the specific instructions of the officers of the Union, and that the Union has consistently repudiated that action. The Record shows that the Union not only disavowed the actions of its rebellious members at the time, and its officials did everything possible to induce them to desist therefrom—in which effort they finally succeeded at the end of the second day,—but that subsequently they branded these actions as unauthorized and illegal in its official organ (203-204).

In this connection it is well to remember that the employer itself in its letter of April 10, 1946 to the Impartial Chairman, seeking his intervention, specifically stated that the acts complained of were *un*authorized by the Union.

> "We also understand that this stoppage of work is entirely unauthorized and consequently is illegal, and

we are also advised that the steward, Joseph S. McCarthy, refused to put the men back to work on the morning of April 10 after being ordered to do so by the President of Local 807 on the evening of April 9" (372).

POINT VIII

The judgment sought to be reviewed denies to petitioners the protection of an Act of Congress, the protection of which was specifically invoked by them, and of the Federal policy declared by that Act.

As shown in the petition herein, petitioners invoked, in the Supreme Court of the State of New York, not only the protection of the due process clause and the equal protection of the laws clause of the Fourteenth Amendment, as a shield against the liability sought to be imposed upon them, but also invoked specifically the protection of Section 6 of the Norris-LaGuardia Act. And in the Court of Appeals they specifically invoked not only Section 6 of the Norris-LaGuardia Act but the Federal policy laid down by Congress in that Act. Section 6 of the Norris-LaGuardia Act reads as follows:

> "Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.
>
> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Title 29, U. S. C. A., Sec. 106.

Nor does this section stand alone in the Norris-LaGuardia Act. *In* addition to making certain specific pro-

visions limiting the jurisdiction and governing the action of Federal courts, that Act lays down a congressional policy governing labor relations in interstate commerce. Section 2 of the Norris-LaGuardia Act reads as follows:

> "Public policy in labor matters declared
>
> In the interpretation of sections 101-115 of this title and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, therefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."
>
> Title 29, U. S. C. A., Sec. 102.

And the opening sentence of the third section of the Norris-LaGuardia Act reads as follows:

> "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102

of this title, is declared to be contrary to the public policy of the United States, * * *".

Title 29, U. S. C. A., Sec. 103.

It will thus be seen that the provisions of Section 6 of the Norris-LaGuardia Act do not stand alone, but are part of the public policy of the United States, and that any agreement in derogation of its provisions is contrary to the public policy of the United States.

Again we must bear in mind that the basis of the right of an arbitrator to make any award is an alleged agreement to accept his decision. In order that the judgment sought to be appealed from may be sustained, it must, therefore, be held that all the members of Local 807 entered into an agreement with respondent giving the arbitrator herein the right to make an award contrary to the provisions of Section 6 of the Norris-LaGuardia Act. But such an agreement is expressly declared by Section 3 of that Act to be contrary to the public policy of the United States. This, we respectfully submit, makes such an agreement absolutely void and unenforceable in any court of the land, whether Federal or State. For it is elementary that no state can make any law contrary to the policy of the United States with respect to a matter which is within the jurisdiction of the Federal government nor have nor enforce any policy contrary to the policy of the Federal government in any matter which is within its jurisdiction. This was expressly held with respect to the Federal policy applicable to labor relations in interestate commerce.

Mondou v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1.

As shown in the petition, the alleged dispute sought to be arbitrated by Motor Haulage, and the alleged damage caused by such dispute, occurred in interestate commerce. And the agreement under which the right to arbitrate such dispute and to recover such damage was claimed were part of an attempt by labor unions and employers' associa-

tions engaged in that commerce to regulate labor relations therein and to remove serious abuses existing therein,—abuses which, either directly or indirectly, affected the problem of labor relations, causing labor disputes.

We respectfully submit that the policy declared by the Norris-LaGuardia Act, including the specific provisions of Section 6 thereof, was the law governing these relations, and afforded to petitioners herein protection which the State of New York had no right to deny them. The judgment sought to be reviewed is therefore reviewable in this Court, quite aside from the constitutional questions discussed in earlier portions of this brief.

CONCLUSION

This case is clearly one in which the public interest requires a full review by this Court of the serious constitutional questions involved. A *writ of certiorari* should therefore be granted by this Court so that a full argument of the constitutional questions raised may be had, and judgment directed by this Court in accordance with its interpretation of the constitutional rights involved.

Dated, New York, June 1949.

Respectfully submitted,

Louis B. Boudin,
of Counsel for Petitioners,
1776 Broadway,
Borough of Manhattan,
City of New York.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1948.

No. 110

LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOHN STRONG, THOMAS HICKEY, SAMUEL GRASSO, ANDREW GAZZILLO and THEODORE SCHULZ,

Petitioners,

AGAINST

MOTOR HAULAGE COMPANY, INC.,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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INDEX.

CASES CITED.

STATUTES AND AUTHORITIES CITED.

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Petitioners,

AGAINST

MOTOR HAULAGE COMPANY, INC.,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Statement.

The proceedings to which the Petition for a Writ of Certiorari is addressed arise under the Arbitration Law of the State of New York (Article 84 of the Civil Practice Act, State of New York).

And the facts are clear: Respondent, Motor Haulage Company (hereinafter called the "Respondent") and the petitioner, Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America (hereinafter called the "Petitioner Union"), were parties to a collective labor agreement

which provided, without any exceptions or limitations, that all "disputes and controversies arising under or in connection with the terms or provisions" of the agreement or its "application or interpretation of any of the terms or provisions" were to be submitted to "Hugh E. Sheridan as the Impartial Chairman, whose decision shall be final and conclusive on all parties" (fols. 186-189, p. 4 of booklet)*

On April 9, 1946, members of Petitioner Union and the shop steward designated by the Union, called and participated in an illegal strike against Respondent. The Company demanded arbitration and damages for losses incurred as a consequence of the illegal strike. After a hearing, upon notice, at which Union representatives appeared and participated, the Arbitrator awarded the Respondent $4,161.88. Under the terms of the collective agreement, the Arbitrator was authorized by both parties to render a money award (fols. 186-189, p. 7 of booklet).

On or about the 21st day of February, 1947, the Respondent moved to confirm the arbitrator's award at a Special Term of the Supreme Court of the State of New York. The motion for confirmation was denied. On appeal, the Appellate Division of the Supreme Court reversed Special Term and granted the Respondent's motion to confirm. Thereafter, the Petitioner Union appealed from the order and judgment of the Appellate Division, to the Court of Appeals of the State of New York. In an opinion, *per curiam*, the Court of Appeals found no error in the decision of the Appellate Division but reversed the judgment on the ground that the action could not be maintained against the Petitioner Union in its common name as an unincorporated association. Accordingly, the Court of Appeals directed that the irregularity in the caption of the proceedings be corrected as

*All references, unless otherwise noted, are to folios in the papers on appeal in the Appellate Division.

permitted by Section 105 of the Civil Practice Act, State of New York.

The Respondent then moved at a Special Term of the Supreme Court to amend the notice of motion in its proceedings to confirm the award by substituting, for the unincorporated association as plaintiff, the names and titles of the President and Secretary and Treasurer of the Union, in their respective representative capacities. This motion was granted and the order and judgment were affirmed by the Appellate Division of the Supreme Court of New York, after an appeal by petitioners John Strong and Thomas L. Hickey, officers of the Petitioner Union.

On or about April 4, 1949, the petitioners Strong and Hickey, officers of the Petitioner Union moved the Court of Appeals for the State of New York for leave to appeal. On April 20, 1949, this motion was denied by the Court of Appeals. *It is significant that at no time, other than incidentally in the motion for leave to appeal, did the Union urge, as it does here, that service was defective.*

The Petition.

Petitioners, *which include persons not parties to this proceeding*, urge the following reasons for the granting by this Court of a Writ of Certiorari:

1. No process was served upon the Union or upon any of its officers or members, and, accordingly, the entry of judgment is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

2. A recovery may be had against a Union under Section 13 of the General Associations Law of the State of New York only upon proof that *all* of the members of the Association participated in the complained-of act.

3. A Union does not bind its members by executing an arbitration agreement which, consonant with the Arbitration Law of the State of New York, includes a waiver of a trial by jury. Since all the members of the Petitioner Union were not parties to the agreement with the Respondent, they are not bound by the agreement made by their Union. Moreover, say Petitioners the arbitration procedure as applied to them is unconstitutional.

4. The arbitration award should have been vacated by the New York Court because of the charge of corruption on the part of the Arbitrator. Failure of the Court to try that charge, amounted to a denial of due process.

5. The Petitioners were denied equal protection of the law in that the award was rendered against the Union only because it was a labor union and that a like award would not be rendered against a business association.

6. The arbitrator's award violates Section 6 of the Norris-LaGuardia Act and, therefore, subverts a national policy binding upon State courts.

Respondents respectfully submit that there is no merit to the alleged grounds for granting the Writ.

Summary of Respondent's Argument.

The petition and supporting brief is a challenge to the wisdom of state legislation and an attack upon state procedure. No federal right was asserted by Petitioners in the State Court and no decision made upon a federal question. Petitioners challenge State Court procedure and for all of the reasons hereinafter set forth no reviewable question is presented to this Honorable Court.

POINT I.

The State Court had jurisdiction over the Petitioner officers of the Union by reason of their general appearance.

Petitioners urge, repeatedly, that no process was served upon the Respondents, John Strong and Thomas L. Hickey, officers of the Union. Respondent concedes that notice of the initial motion to confirm the award was served upon the attorneys for the Union rather than upon the President or Treasurer of the Union. The attorneys for the Union not only entered into stipulations on behalf of the Petitioner Union, but actively appeared and participated in all of the proceedings with the knowledge and authorization of the Union. More significantly, on the motion to amend the caption, and to confirm the arbitrator's award, the attorneys for Petitioners Strong and Hickey *appeared generally.* And on the appeal to the Appellate Division of the Supreme Court, the attorneys for the same Petitioner again appeared *generally.* And precisely the same appearance was made in the motion for leave to appeal to the Court of Appeals. Moreover, the Union and its officers participated in every stage of the court proceedings without objection to the alleged defective service, except upon the motion for leave to appeal to the Court of Appeals.

The motion to amend the caption and to confirm the award was a statutory proceeding, in the nature of an action, leading to an order and final judgment. On such a motion, an objection to jurisdiction on the ground of improper service, may be asserted by a *special,* as distinguished from a *general,* appearance.

Braman v. *Braman,* 236 App. Div. 164, 258 N. Y. S. 181;

Citizens Trust Co. of Utica v. *R. Prescott & Sons,* 221 App. Div. 420, 223 N. Y. S. 184.

Assuming, *arguendo*, that the service upon the attorneys was ineffective to confer jurisdiction over the Union, the *general appearance* of the Petitioners was an unequivocal waiver of the sufficiency or regularity of service of process.

> *Ogdensburgh And Lake Champlain Railroad Company* v. *Vermont And Canada Railroad Co.*, 63 N. Y. 176;
> *Reichel* v. *Standard Rice Co. Inc.*, 225 App. Div. 628, 234 N. Y. S. 137;
> *Freeman* v. *Freeman*, 126 App. Div. 601, 110 N. Y. S. 686;
> *Layton* v. *McConnell*, 61 App. Div. 447, 70 N. Y. S. 679;
> *Onondaga Hotel Corporation* v. *Gurny* (2nd) 62 N. Y. S. (2d) 550.

Indeed, service was properly made. Section 1461 of the Civil Practice Act of New York provides, in part, that service may be effected upon the attorneys for the adverse party:

> "Notice of the motion must be served upon the adverse party *or his attorney*, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court." (Emphasis supplied.)

In the State of New York, jurisdiction over the person of a defendant may be secured either by personal service upon him of the summons and complaint or by a general appearance. Thus, one who becomes an actor in the proceedings in any stage by participating in the controversy on the merits is held to have appeared generally and defects of service are waived.

Feinberg v. *Enselberg,* 185 Misc. 358, 56 N. Y. S. (2d) 741;
Jorgebloed v. *Erie R. Co.,* 180 Misc. 893, 42 N. Y. S. (2d) 260;
Merchants Heat & Light Company v. *J. B. Clow & Sons,* 204 U. S. 286, 290, 51 L. Ed. 286;
Farmer v. *National L. Association,* 138 N. Y. 265;
Reed v. *Chilson,* 142 N. Y. 152;
Henderson v. *Henderson,* 247 N. Y. 428, 160 N. E. 775.

Thus, Section 237 of the Civil Practice Act, State of New York, prescribes that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

In *Hill* v. *Mendenhall,* 88 U. S. 453, 22 L. Ed. 616, the attorney for the party rather than the defendant was served. This Court held:

> "It is true that the record sued upon in this case does show that defendant was not served with process, but it also shows a voluntary appearance by his attorney. If this appearance was authorized, it is exactly for the purposes of jurisdiction as the actual service of the summons. When an attorney * * * appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind a party until it is proven that the attorney acted without authority."

Petitioners now seek to attack the jurisdiction of the New York Courts even though they remained to debate

the merits at six different stages of the proceedings. Obviously, there is no merit to Petitioners' contention.

> *Dyker Heights Home for Blind Children, Inc.* v. *Stolitzky,* 250 App. Div. 229, 294 N. Y. S. 15.

To suggest, as do Petitioners, that they were denied due process because of the absence of personal service upon them is to commit the error of reading into the Fifth and Fourteenth Amendments to the Constitution, a guarantee of a particular form of procedure.

> *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 82 L. Ed. 1381.

In *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 343, 81 L. Ed. 1143, this Court said:

> "The immediate question is whether the authorized proceeding affords a fair and adequate remedy. We accordingly inquire whether the prescribed procedure gives an opportunity for a fair hearing in determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant, embracing whatever right of refund the claimant is entitled to assert under the Federal Constitution."

If there be notice, a hearing and participation, the requirements of due process are satisfied. A correct decision is not an element of due process; a fair hearing is all that is required.

> *Central Land Company* v. *Laidley,* 159 U. S. 103, 40 L. Ed. 103.

In *Ownbey* v. *Morgan*, 256 U. S. 94, 65 L. Ed. 837, this Court held:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."

Accordingly, if the court "has jurisdiction and acts not arbitrarily but in conformity with the general law, upon evidence and after inquiry made with notice to the parties affected, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with."

Twining v. *State of New Jersey*, 211 U. S. 78, 53 L. Ed. 97;
Roller v. *Holly*, 176 U. S. 398, 44 L. Ed. 520;
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565;
Hess v. *Pawlowski*, 274 U. S. 352, 71 L. Ed. 1091.

In *Western Life Indemnity Co. of Illinois* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220, the defendant corporation was served by substituted service under State Law. The corporation appeared specially to contest jurisdiction and also to debate the merits. The judgment for the defendant was reversed on appeal. The Court of Appeals of Kentucky held that the defendant had waived the special appearance by participation in the merits. On the appeal to the Supreme Court, defendant claimed that the Kentucky rule violated the due process clause of the Constitution. Affirming the decision of the Kentucky Court, this Court said:

> "That a State, without violence to 'the Due Process' Clause of the Fourteenth Amendment,

> may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of defendant, is settled by the decision of this court in *York* v. *Texas,* 137 U. S. 15, followed by *Kauffman* v. *Wotters,* 138 U. S. 285."

The Arbitration Law of New York neither confers nor abridges rights of action. Since its sole objective is the regulation of remedies it is procedural, rather than substantive, in context and content. An arbitration agreement provides for remedies rather than substantive rights. Hence, the determination of the validity of an arbitration agreement is a matter peculiarly reserved for the State courts.

California Prune & Apricot Growers Ass'n v. *Catz American Co.,* 60 F. (2d) 788;

United States Asphalt Refinery Co. v. *Trinidad Lake Petroleum Co., Limited,* 222 F. 1006;

Berkovitz v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288;

Marine Transit Corp. v. *Dreyfus,* 284 U. S. 263, 76 L. Ed. 282;

Red Cross Line v. *Atlantic Fruit Company,* 264 U. S. 109, 68 L. Ed. 582;

Merchant v. *Meade-Morrison Mfg. Co.,* 29 F. (2d) 40 (interpreting New York Law).

POINT II.

Under the law of the State of New York a judgment against a Union may be collected out of the common treasury of the Union even if all the members did not participate in the complained-of act.

Petitioners do not deny that the collective bargaining agreement which contains the arbitration clause was ratified by the members of the Union. But they propose a new principle: namely, that a common treasury may not be reached to satisfy a judgment unless *all* of the members participated in the complained-of act. Petitioners' error arises out of a misconstruction of Sections 12, 13 and 16 of the General Association Law of New York.

Section 13 provides that suit may be maintained against the president or treasurer of an unincorporated association when the liability of the members is either *joint* or *several*. Consequently, the act of officers and directors of a trade union authorized by the membership is binding upon all of the members (even though there be dissenters) and the common treasury of the union may be reached in an action for damages to satisfy the joint liability of the members.

People v. *Brotherhood of Painters, Decorators and Paper Hangers of America*, 218 N. Y. 115, 112 N. E. 752;
Meinhart v. *Contresta*, 194 N. Y. S. 593;
Bobe v. *Lloyd*, 10 F. (2d) 730 cert. den. 270 U. S. 663.

"The purpose of this section is obvious; prior to its adoption, if one would bring an action against an association it would have been necessary to bring in as parties all the individual members of the association, on the theory of a part-

> nership. This requirement was such that in many instances it amounted to a denial of justice, and it was to avoid the inconvenience and the injustice of such a situation that this section was adopted authorizing action against the president or treasurer of the association. An action may be brought against either of these officers not in their individual but rather in their representative capacity."
>
> *Hagan* v. *Bricklayers' etc. Union No. 28,* 143 Misc. Rep. 591, 256 N. Y. S. 898.

A complete answer to the contention of the Petitioners is provided in *Glauber* v. *Patof,* 183 Misc. 400, 47 N. Y. S. (2d) 762. In that case an action was brought by plaintiff for reinstatement as a member of the defendant union and for damages because of illegal expulsion from membership. Suit was brought against the president of the Union as prescribed in Section 13.

The plaintiff was expelled by action of the grievance committee. Defendant objected to the claim for damages on the ground that the Union:

> "is not liable to pay the losses of an expelled member unless all the members of the association are liable, and all the members are not liable here."

The Court held:

> "There is no question but that an action may not be maintained against an association under section 13 of the General Association Law, unless the evidence establishes that all the members of the association are liable, either jointly or severally, to pay the plaintiff the amount of his claim. Liability is, of course, a legal consequence. The question in each case is whether that consequence follows from the facts of the case."

Under the by-laws of the Union, the power of expulsion was vested in the grievance committee, but it was also prescribed that the general membership should be advised by action of the committee by a reading of the reports of committees at all general meetings. Plaintiffs were expelled at a meeting of the grievance committee held on January 22nd, 1943. The next general meeting of the association was held on February 8th, 1943. The testimony shows that neither the minutes nor the report of the grievance committee were read, but that there were questions from the floor as to why the plaintiffs were discharged. The Court there held:

> "The members of the association undertook by their contract of association to fix the terms of membership and to exercise the power of expulsion by delegating that power to the grievance committee, and, being mindful of the important power they had vested in the committee, provided, in order to exercise the necessary control over committees, that reports of committees should be made at each meeting of the general membership. It would not seem too much to require the membership in such case to assume responsibility for the actions of its duly-constituted agents."

Now, of the total members of 89, there were 45 members present at the general meeting of February 8th. The Court said:

> "Counsel for the defendant argued at the trial that notice to a majority of the membership was not enough, that notice must come to the personal attention of every member, and acknowledged that in his view a membership association might always exempt itself from liability by having one

> member absent himself from meetings. While it is difficult to define with satisfactory preciseness the necessary quality and quantity of notice to the general membership to make an association liable, it can at least be said that the contention of the defendant is as far from being the law as it is far from reality."

The Court concluded:

> "If the membership sees fit to delegate the power of expulsion to a committee, it should not be too much to require the membership as a whole to assume responsibility for the actions of the committee. The decision in this case need not rest on such general principles, however. It rests upon a finding that there was bad faith on the part of the membership as a whole in countenancing the expulsion of the plaintiffs upon the record which was before the general meeting on February 8, 1943."

Thus, the Court had found that even though there were only 45 present at the meeting, the entire Union was liable.

Section 12 of the General Associations Law is companion to Section 13. The language of the two sections are identical except that Section 12 applies to actions or proceedings *by* an unincorporated association and Section 13 deals with actions or proceedings *against* an unincorporated association. If the suggested interpretation of Section 13 is correct, then a like interpretation must be given to Section 12 and if such an interpretation is adopted, then under Section 12 a labor union can never institute a suit in the name of its president or treasurer unless each of the members was separately,

individually and personally damaged. Obviously, such a construction would vitiate the rights of a labor union to come into the courts. But the courts of this State have uniformly rejected such a construction.

In *Kirkman* v. *Westchester Newspapers, Inc.*, 261 App. Div. 181, 24 N. Y. S. (2d) 860, the Union instituted suit through its president to recover damages for libel. The libel concerned only the character of the officers of the union. The Court there held that the rule in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, prescribing that a trade union could only be sued or sue in the names of its members and liability had to be enforced against each member, was no longer the law in this state. Thus says the Court:

> "In this State, a labor union may sue and be sued as provided in Sections 12 and 13 of the General Associations Law (added by Laws 1920, c. 915). A judgment obtained against the Union may be enforced against the personal or real property belonging to the association owned jointly or in common by all of its members (General Associations Law, Sec. 15). Thus, an action brought against the president of a labor union pursuant to Section 13 of the General Associations Law while nominally against him actually is against the association. *Thomann* v. *Flynn*, 251 App. Div. 325, 295 N. Y. S. 577; *Kelso* v. *Cavanagh*, 137 Misc. 653, 657, 244 N. Y. S. 90, opinion by Untermyer, *J.*"

The argument advanced by the petitioners here was precisely the argument submitted by the defendant in the cited case. However, the Court held:

> "Appellants argue that the members of the Union may not join in one cause of action for

libel, as the damages to reputation which each member might have sustained vary with each member and that such damages would have to be proved separately for each member. However, by statute (General Associations Law, Sec. 12), an action may be maintained by the president or treasurer of an unincorporated association to recover any property or upon any cause of action, for or upon which all of the associates may sue by reason of their interest or ownership therein either jointly or in common. In our opinion, each member of plaintiff union has a common interest in the reputation of the Union. If the business and credit of the Union be destroyed, as well it might be by defamatory statements which falsely charge corrupt and dishonest acts by the Union, each of its 17,000 members is affected equally by the possible loss of position and the loss of protection and benefits furnished by the Union. Each member has a common and equal interest in a cause of action to recover damages for injury thus produced. *Stone* v. *Textile Examiners & Shrinkers Employers' Ass'n.*, 137 App. Div. 655, 122 N. Y. S. 460."

The decision in the *Kirkman* case has been applied in a variety of actions thereafter instituted and maintained. In *Lubliner* v. *Reinlib*, 184 Misc. 472, 50 N. Y. S. (2d) 786, suit was instituted by one union against another. In this case not only were the officers sued in their representative capacity, but the unions were designated as parties as though they were separate legal entities. The Court held that there was no need to include the names of the unions in the title of the action. The Court then said:

"In the *Kirkman* case the Court of Appeals made clear that the action could be maintained merely upon a showing of libel of the group only, and not of the members personally and individually. And even before the *Kirkman* decision, this Court had indicated that such a suit was tenable. *National Variety Artists, Inc.* v. *Mosconi*, 169 Misc. 982, 983, 9 N. Y. S. (2d) 498, 499, but cf. *Stone* v. *Textile Examiners & Shrinkers Employers' Ass'n*, 137 App. Div. 655, 122 N. Y. S. 460."

The error into which the Union falls is to confuse joint liability with individual participation. But Section 13 is plain. If the members are liable jointly, action may be maintained against the Union in the name of a president or treasurer even though each of the members did not participate in the complained-of act.

The language "jointly or severally" contained in Section 13 is disjunctive, implying that suit may be maintained against the Union in the name of the president or treasurer in either of two events: (a) when each of the members are severally liable because of individual participation in a complained-of act or (b) if the members are jointly liable because of an act which an agent was authorized and did perform. It is plain here that the liability of the members of Petitioner Union is joint and the common treasury can be reached by an action maintained against the president or treasurer.

Finally, the provisions of Section 13 are procedural, they effect no changes in the substantive law, and hence no reviewable question is presented.

Lubliner v. *Reinlib*, 184 Misc. 472, 50 N. Y. S. (2d) 786.

POINT III.

The arbitration agreement was binding on the members of the Union and the constitutionality of arbitration statutes is now well-established.

Concededly, the members of the Petitioner Union ratified the collective bargaining agreement and are therefore estopped from denying its validity. Only by advancing the now rejected and abandoned theory that a collective bargaining agreement is essentially a treaty between two sovereignties, not binding upon the constituent members of the contracting parties, can Petitioners support the notion that a collective labor contract is binding only upon union members employed by the Respondent. But it is important to observe first, that a collective labor agreement is enforceable in the same way as any other contract and second, the liability asserted here is a joint liability arising out of a matter of common interest and concern to all of its members.

Section 1448 of the Civil Practice Act of New York provides:

> "A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies, thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Particularly significant in this connection is the decision by the Court of Appeals in *Application of Devery*, 266 App. Div. 213, 41 N. Y. S. (2d) 293, aff'd 292 N. Y. 596, 55 N. E. (2d) 370, which involved the instant contract, this Petitioner Union and the same arbitrator. There, the proceeding was initiated by a letter addressed to the attorney for the employer, by the attorney for the union (41 N. Y. S. [2d] 293, at p. 296). Indeed, in the letter written by the attorneys for the Union the word "arbitration" nowhere appears. Despite the fact that the letter by which the arbitration proceeding was initiated merely expressed an opinion that the matter was one cognizable by Mr. Sheridan as Impartial Chairman, the Appellate Division for the First Department held:

> "By the terms of the collective agreement such as that existing here, there is created an exclusive method of arbitrating all disputes between members of the Union and the association. Where the parties are unable to agree upon any question, the controversy is referred to a permanent arbitrator known as the impartial chairman. His decision is final and binding upon the parties. This court has heretofore upheld the validity of similar collective agreements. *Goldman* v. *Cohen*, 222 App. Div. 631, 227 N. Y. S. 311; *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N. Y. S. 401; *Matter of Sun-Ray Cloak Co. Inc.*, 256 App. Div. 620, 623; 11 N. Y. S. (2d) 202. See, also, Section 1448, Civil Practice Act as amended by Laws of 1940, Ch. 851" (at p. 295).

And that arbitration awards are enforceable in the State Court is now too well-settled to warrant extended exegesis.

Under Section 1448 of the Civil Practice Act, an award in an arbitration proceeding is enforceable if (1) the arbitration agreement was founded upon a valid and existing contract, (2) the subject matter of the arbitration proceeding and the arbitration award were contemplated by the arbitration agreement, (3) the dispute was submitted to the Arbitrator and (4) the Arbitrator rendered and presented an award in the form and manner required by Statute. And an arbitration award may be set aside only (1) if procured by corruption, fraud or other undue means; or (2) there was evident partiality or corruption on the part of the Arbitrator; or (3) the Arbitrator was guilty of misconduct; or (4) there was neither a valid contract to arbitrate nor an effective submission to arbitration; or (5) the Arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

There being (1) a contract to arbitrate "any and all disputes"; (2) a dispute submitted pursuant to that contract, to the Arbitrator, and (3) an award, it is incontrovertible that the award was enforceable. Thus, it has been held:

> "Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either a sto the law or the facts is final and conclusive, and a Court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment either as to the law or as to the facts. If he keeps within his jurisdiction, and is not guilty of fraud, corruption, or other

misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it."

Matter of Wilkins, 169 N. Y. 494, 496, 61 N. E. 575.

See too:

Shirley Silk Co. Inc. v. *American Silk Mills, Inc.,* 257 App. Div. 375, 13 N. Y. S. (2d) 309; See n. 17 N. Y. U. L. Q. Rev. 659 (1940);

Delma Engineering Corporation v. *John A. Johnson Contracting Corporation,* 267 App. Div. 410, 45 N. Y. S. (2d) 913;

S. A. Wenger & Co. Inc. v. *Propper Silk Hosiery Mills, Inc.,* 239 N. Y. 199, 146 N. E. 203.

In *Pine Street Realty Co., Inc.* v. *Coutroulos,* the Appellate Division for the First Department, 233 App. Div. 404, 253 N. Y. Supp. 174, 177, app. den. 258 N. Y. 609, 180 N. E. 354, it was held:

"Where parties select an arbitrator to pass upon a controversy arising between them, his determination, both as to the law and as to the facts, is not reviewable as though the matter were conducted according to the law of the land in a judicial court. Mere errors of judgment found no ground upon which to set his determination aside. He has merely to keep within the submission of the controversy and avoid fraud, corruption, or misconduct, affecting his award, to render it impregnable. It becomes final excepting where grounds exist, as specifically provided in the Civil Practice Act, Section 1457, for vacating an award. Errors,

> mistakes, departures from strict legal rules, are all included in the arbitration risk and 'perverse misconstruction' includes none of these in its category. See: *Matter of Wilkins,* 169 N. Y. 494, 496, 62 N. E. 575."

See, too:

Friedheim v. *International Paper Co.,* 265 App. Div. 601, 40 N. Y. S. (2d) 144;
C. Itoh & Co. Limited v. *Boyer Oil Co. Inc.,* 198 App. Div. 881, 191 N. Y. Supp. 290;
Stefano Berizzi Co., Inc. v. *Krausz,* 208 App. Div. 322, 325, 203 N. Y. Supp. 442, 444.

To charge, as do petitioners, that they were denied due process because of the alleged failure to give notice of the arbitration hearing is not only an incorrect statement of fact but without merit as a legal objection.

Equally untenable is the claim that the arbitration proceedings amounted to a denial of due process. Thus, in *Hardware Dealers Mutual Fire Insurance Company of Wisconsin* v. *Glidden Company,* 284 U. S. 151, 76 L. Ed. 214, the Appellant, an insurance corporation, licensed to write fire insurance policies in Minnesota issued a policy insuring the appellees' assignor against loss, by fire, of personal property. Minnesota, by statute, required all fire insurance companies licensed to use a standard form of policy which provided for arbitration of the amount of any loss, with certain exceptions. A loss having occurred, the insured appointed an arbitrator and demanded that the amount of loss be determined by arbitration. The appellant refused to participate in the arbitration and the assured procured the appointment of an umpire to act with the arbitrator designated by the insured. The arbitrator and umpire proceeded to determine the amount of loss and made their award. The appellant set up by way of defense

that the requirement that the appellant employ an arbitrator infringes the due process and equal protection clauses of the 14th Amendment. In short, the appellant contended that its freedom of contract was restricted by the Minnesota statute. The question decided by the Supreme Court was whether the 14th Amendment precluded the exercise of such compulsion by the State Legislature. The Supreme Court held (at p. 157):

> "The right to make contracts embraced in the concept of liberty guaranteed by the 14th Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

And the Court found (at p. 158):

> "The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40."

As for the constitutionality of the arbitration law, Petitioners unfortunately rely upon decisions relating to an arbitration statute now superseded by the present

New York Act. Indeed, the decision in *Schafran & Finkel, Inc.* v. *M. Lowenstein & Sons, Inc.*, 280 N. Y. 164, 19 N. E. (2d) 1005 upon which petitioners build their fragile case stands squarely for principles which expose the weakness of the petitioner. Even under the former arbitration law of New York, the enforcement of an award would not be barred where, as here, there was a contract to arbitrate or where the parties participated, as they did here, in the selection of the arbitrator or in any of the proceedings before him.

The present Arbitration Law of New York has been upheld by the Court of Appeals. In *Berkovitz et al.* v. *Arbib and Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288, the Court held that the arbitration statute neither denies due process nor impairs the obligations of contracts nor curbs the powers of the Court. Thus, the Court, by Cardozo, *J.*, held:

> "The statute is assailed as inconsistent with Article 1, Section 2 of the Constitution of the State, which secured the right of trial by jury. The right is one that may be waived" (p. 273).

And, again:

> "Jurisdiction (of the Supreme Court) is not renounced, but the time and manner of its exercise are adapted to the conventions of the parties restricting the media of proof" (p. 275).

And, further:

> "Finally, the statute is said to violate Article 1, Section 10 of the Constitution of the United States * * *. There is no merit in the contention. The obligation of the contract is strengthened, not impaired" (p. 276).

See, too,

Finsilver, Still & Moss, Inc. v. *Goldberg, M. & Co., Inc.*, 253 N. Y. 382, 390, 171 N. E. 579.

POINT IV.

The denial of a trial of the issue of the claimed corruption of the arbitrator did not amount to a denial of due process.

Although the New York Arbitration statute provides that an award may be vacated if procured by fraud or corruption if arbitrator has been guilty of evident partiality or corruption, a mere accusation of corruption or fraud, such as petitioners make, does not give rise to a right of a trial of the charge.

In *Everett* v. *Brown*, 120 Misc. Rep. 349, 198 N. Y. S. 462, the Court held, at page 466, that:

> "The partiality of an arbitrator must be clearly shown before the Court will set aside his award for that reason. The burden of showing partiality rests on the party making the charge. Defendants have not, in my opinion, sustained their charge."

See, too,

Shirley Silk Co. Inc. v. *American Silk Mills, Inc., supra;*
Matter of Friedheim v. *International Paper Co., supra.*

And it has also been held that an arbitrator's errors of judgment cannot support a charge of bias.

Pine Street Realty Co. v. *Coutroulos, supra;*
Matter of Wilkins, supra.

POINT V.

The petitioners were not denied the equal protection of the laws.

Petitioners urge that the award imposes upon the Union a peculiar species of liability and is, accordingly, discriminatory against workmen as a class. This contention is palpably without merit. Section 13 of the General Associations Law of New York is applicable to suits by and against such a variegated group of unincorporated associations as the New York Stock Exchange, a trade union, a County Committee of a political party, a partnership having a president and treasurer, and a veterans' organization, among others.

> *Sewell* v. *Ives,* 61 How. Prac. (N. Y.) 54;
> *96 Fifth Avenue Corporation* v. *Greenberg,* 180 Misc. 614, 44 N. Y. S. (2d) 231, aff'd 181 Misc. 142, 47 N. Y. S. (2d) 222;
> *Conklin* v. *Mezzano,* 46 N. Y. S. (2d) 281.

Clearly, then, a businessmen's association is no less liable for its torts and breaches of contract than a trade union and, under Section 13 of the General Associations Law, precisely the same judgment may be rendered against the two unlike organizations. To read into Section 13 a theory of historical materialism is to strain the technique of dialectics.

Equally insupportable is the suggestion by Petitioners that the recent opinion of the New York Court of Appeals in *Western Union Tel. Co.* v. *American Communications Ass'n, C. I. O.,* 299 N. Y. 177, 86 N. E. (2d) 162, demonstrates the dichotomy of one principle of law for employers and another for trade unions. In the case cited by Petitioners the power of the arbitrator was rigorously

circumscribed; in the instant case, all disputes and grievances, without limitation, were committed to the arbitrator for decision. Where parties confer upon an arbitrator wide and unlimited powers, his decision is binding and conclusive; where his powers are limited, his award must fall within the boundaries of his prescribed authority. This distinction, Petitioners, unfortunately, overlook.

POINT VI.

The Norris-La Guardia Act is not binding upon State Courts nor does it establish a national policy that has become an integral part of State Law.

There are two fundamental and decisive difficulties with Petitioners' contention here. Neither the Norris-LaGuardia Act nor Section 876 (a) of the Civil Practice Act prohibits the making of the contract providing for arbitration leading to an award of damages against a Union.

The limitations of the Norris-LaGuardia Act "are upon all courts of the United States in all matters growing out of labor disputes covered by the act which may come before them".

> *United Brotherhood of Carpenter and Joiners of America* v. *United States,* 330 U. S. 395, 91 L. Ed. 973;
>
> *Allen-Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U. S. 797; 89 L. Ed. 1939;
>
> *United States* v. *American Federation of Musicians,* 318 U. S. 741, 87 L. Ed. 1120.

In the *United Brotherhood* case, *supra,* this Court discussed at length the implications of Section 6 of the Norris-LaGuardia Act. Thus, says this Court (at pp. 409-10):

"Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming union responsibility for such agreements. Facile arrangements do not create immunity from the act, whether they are made by employee or employer groups. The conditions of liability under Section 6 are the same in the case of each. The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages and working conditions may well be sufficient to make the union liable."

See, too,

Mayer Brothers Poultry Farms v. *Ely Meltzer* 274 App. Div. 169, 78 N. Y. S. (2d) 842;
International Longshoremen's & Warehousemen's Union, C. I. O. v. *Wirtz,* 170 F. (2d) 183.

POINT VII.

The petition must be denied because it is defective in form and raises no reviewable issues of fact or law.

Rule 12 of the Rules of the Supreme Court prescribes that where review is sought of a decision of a State Court the petition shall set forth the manner in which the "federal questions sought to be reviewed were raised". Nowhere is such a statement made in the petition. Nor is the supporting brief "direct and concise" as provided for in Rule 38.

Even more fundamentally defective is the evident fact that there is no showing of a denial of a federal right specifically set up or asserted in the State Court. A bare claim of a federal right does not cure this defect.

Wilson v. *North Carolina,* 169 U. S. 586, 42 L. Ed. 865;
Missouri Pacific Railroad Company v. *Clarendon Boat Oar Company, Inc.,* 257 U. S. 533, 66 L. Ed. 354.

Indeed, if it were assumed, *arguendo* that a federal question was presented, it does not appear, from the record, that its decision was necessary to a determination of the cause in the New York Court. Accordingly, the petition must be denied.

Hoyt v. *Shelden,* 66 U. S. 518, 17 L. Ed. 65;
White River Lumber Co. v. *State of Arkansas,* 279 U. S. 692, 73 L. Ed. 903, reh'g den. 50 S. Ct. 78;
Municipal Investors Ass'n v. *City of Birmingham,* 316 U. S. 153, 86 L. Ed. 1341.

Petitioners' contentions amount to a prayer that this Court construe a State statute notwithstanding the principle that the Supreme Court will accept the construction given to the statute by the State Court.

S. R. A. Inc. v. *State of Minnesota,* 327 U. S. 558, 90 L. Ed. 851;
Williams v. *Kaiser,* 323 U. S. 471, 89 L. Ed. 398;
Cohen v. *Beneficial Industrial Loan Corporation* (1949) .... U. S. ...., 17 U. S. L. W. 4530;
Arthur Termaniello v. *City of Chicago* (1949), ...U. S. ...., 17 U. S. L. W. 4395.

And since the Petitioners direct their attack upon the judgment here it may be well to point out that the

"* * * scope and effect of a state judgment is peculiarly a question of state law, and therefore a

decision relating only to such subject involves no federal question."

Kenney v. *Craven*, 215 U. S. 125, 54 L. Ed. 122.

Nor does "the due process clause of the Fourteenth Amendment * * * control methods of procedure * * * "

McDonald v. *Oregon Railroad & Navigation Company*, 233 U. S. 665, 58 L. Ed. 1145.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 110

LOCAL UNION No. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOHN STRONG, THOMAS HICKEY, SAMUEL GRASSO, ANDREW GARRILLO and THEODORE SCHULZ,

Petitioners,

against

MOTOR HAULAGE COMPANY, INC.,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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AUTHORITIES

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No. 854

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief in opposition to petition for a writ of certiorari in the within matter is a document so replete with inaccurate statements of fact, with incorrect statements of petitioners' position, and with incorrect and misleading citations of authority, that a reply brief fully discussing all of respondent's deviations from fact and law would be so lengthy as to constitute an undue burden upon this Court. Accordingly, although we would like to give exhaustive treatment to the various statements made and claims advanced by respondent, we shall confine ourselves to pointing out just a few of respondent's grossly misleading statements and claims.

POINT I

The Arbitration Agreement provided that arbitration was to be had before the Arbitration Authority for the Trucking Industry of the City of New York and not before Hugh E. Sheridan.

On page 2 of its brief respondent asserts that arbitrable disputes between the parties were to be submitted to Hugh E. Sheridan, as the Impartial Chairman. An examination of the collective bargaining agreement between Local 807 and respondent, however, conclusively demonstrates that there was no agreement to submit disputes to arbitration by Mr. Sheridan. Section 9 of the collective bargaining agreement, which embodies the primary agreement between the parties to submit disputes to arbitration, provides:

> "Should any dispute arise between the Employer and an Employee, or the Employer and the Union, concerning the application or interpretation of any provision of this agreement or concerning any term or condition of employment, or otherwise, the representatives of the Employer and the representatives of the Union shall attempt to adjust the controversy between themselves. In the event they are unable to adjust the same, the dispute shall, within two days after the request of either party, be submitted *to the Arbitration Authority for the Trucking Industry of the City of New York* for arbitration, whose decision shall be final and binding upon the parties hereto" (fols. 162-163 of the Record on Appeal in the Appellate Division). (Italics supplied.)

As we have indicated in our original brief in support of our application for a writ of certiorari, although Mr. Sheridan is still alive, the Arbitration Authority for the Trucking Industry of the City of New York had ceased to exist several months prior to the holding of the so-called "arbitration" in this case. Accordingly, if respondent was entitled to arbitration at all, since the named arbitrator

was out of existence at the time arbitration was sought, an application should have been made, pursuant to the applicable New York statute, to the Supreme Court of the State of New York for an order appointing an arbitrator. There was absolutely no basis in law for an arbitration before Mr. Sheridan, since Mr. Sheridan as an individual had never been named as arbitrator and his position of Impartial Chairman of the Arbitration Authority had ceased to exist.

POINT II

There was no general appearance by the officers of the Union against whom the judgment appealed from runs.

In an attempt to answer petitioners' contention that the judgment appealed from violates due process of law because the parties against whom it runs were never served with process in this case, respondent advances the claim that there was a general appearance by the parties against whom the judgment runs, and cites numerous authorities for the obvious proposition that where there has been a general appearance the Court obtains jurisdiction over the person so that the question of service of process ceases to be of significance. But the fact is that there never was a general appearance by the parties against whom the judgment runs prior to the entry of that judgment, and the only "appearance" thereafter was to take an appeal therefrom.

The record clearly shows that the first proceeding, the one that was brought against the Union in its common name, was initiated by service of the petition upon the attorneys for the Union. All papers in that proceeding bore captions containing the common name of the Union alone and no paper bore any caption containing the names of Strong and Hickey, the officers of the Union against

whom the judgment now appealed from runs. Indeed, Strong and Hickey never even made affidavit in that proceeding.

When the case was sent back by the Court of Appeals after that Court's decision that the action could not be maintained against the Union in its common name, respondent made an application at Special Term of the Supreme Court of the State of New York to amend the title of the action by substituting the names of Strong and Hickey for the common name of the Union as party defendant.

That application was made by a motion in the same old proceeding, and its caption contained only the common name of the Union as party defendant and did not contain the names of Strong and Hickey at all. Furthermore, the application was not served upon Strong and Hickey but upon the attorneys for the Union as such; and they, in turn, opposed the application *as attorneys for the Union.* The application was thereupon granted and judgment was entered not against the Union but against John Strong as President and Thomas Hickey as Secretary and Treasurer thereof, this being the first time the names of the present defendants (petitioners in this Court) appeared in the record. At no time up to the entry of the judgment appealed from did the name of Strong or Hickey appear in the proceeding; and the only thing left for them to do when judgment was entered against them was to appeal from that judgment, since the New York practice does not provide for any proceeding by which they could have sought to set the judgment aside.

Clearly, the judgment was entered in violation of petitioners' rights under the due process clause of the Fourteenth Amendment inasmuch as they had never been served with process nor appeared in the action.

The case of *Yeager* v. *Cooperative Underwriters Association,* 243 App. Div. 743, cited by the Court of Appeals in its opinion remitting the proceeding to Special Term, clearly demonstrates that the appearance by the Union in its common name was not an appearance by the officers

of the Union who might be sued under Section 13 of the General Associations Law. The record in that case shows that it was an action for libel brought against an unincorporated association in its common name. The summons and complaint were served upon one Frank P. Tucker. The defendant association thereupon served its answer which was verified by the said Tucker as its secretary. The association then succeeded, through dilatory tactics, in preventing any steps in the action being taken until after the short statute of limitations had run. The association then moved to dismiss the action on the ground that there was no party defendant before the Court. The plaintiff countered by making a motion to substitute as party defendant Mr. Tucker, upon whom process had been served and who had verified the association's answer, the plaintiff claiming that he was treasurer of the association at the time process was served upon him. Plaintiff's motion for substitution was denied by the Special Term. On appeal, the Appellate Division reversed. It did not, however, grant the plaintiff's motion. Instead, it remanded the case to Special Term with directions to grant plaintiff's motion if, upon ascertaining the facts, it was found that Tucker, who had been served with process, was actually the treasurer of the association at the time he was served.

It is thus clear that, under New York law, in cases where the defendant is a business association and not a labor union, an appearance by the association when sued in its common name, and even a verification of its answer by the person sought to be substituted as party defendant, does not constitute an appearance for such person if process had not originally been served upon him.

POINT III

The judgment appealed from violates due process of law because it holds the ten thousand odd members of Local 807 liable for the act of a few hundred of its members.

As we have shown in our original brief in support of a petition for certiorari, the judgment appealed from in effect imposes liability *upon the entire membership of Local 807*. Since it is undisputed that only a small fraction of that membership participated in the allegedly wrongful acts which were made the basis of this proceeding, that judgment has the clear result and effect of making one group of persons liable for the wrongful act of another. In so doing, we respectfully submit, the judgment infringes upon the rights of the members of the Union under the due process clause of the Fourteenth Amendment.

Respondent attempts to meet this argument by advancing the claim that, under the law of the State of New York, a judgment against a union may be collected out of the common treasury of the union even if the membership as a whole did not participate in the act complained of. This contention, in the first place, is entirely beside the point because, as we have pointed out, the judgment appealed from can affect far more than the union treasury and may lead to the individual liability of each and every member of the Union. It is beside the point, also, because even if the law of the State of New York were as it is stated to be by respondent, that would not necessarily mean that that law was in accordance with the provisions of the United States Constitution.

As a matter of fact, the law of the State of New York is not what respondent claims it to be. At least in cases where suit is brought against a labor union by another union or by one of its own members, the law of the State of New York clearly provides that unless all of the members

of the union participated in or authorized the alleged wrongful act there can be no liability in damages on the part of the organization.

The principal case upon which respondent relies is *Glauber* v. *Patoff*, 183 Misc. 400. In that case, the plaintiff, a union member, had been subjected to disciplinary action by the union which was imposed at a meeting at which 45 out of the 89 union members were present. As a result of the disciplinary action the plaintiff was put out of employment. He in turn brought action in court for reinstatement and for damages for loss of wages. The Supreme Court of the State of New York, sitting in Special Term, decided that plaintiff had been wrongfully disciplined and directed his reinstatement with damages for loss of wages. Respondent in the instant case, relies upon that decision as "a complete answer to the contention of the petitioners" and as a clear holding that a union treasury and the members of the union may be mulcted in damages for acts in which only a portion of the membership participated.

What respondent has curiously overlooked is the fact that this decision *was reversed by the Court of Appeals* in so far as the question of damages was concerned. That Court squarely held that the union could not be held liable for damages for an act in which only a portion, although a majority, of its members had participated. The Court said:

> "There was no support in the evidence for the finding that the general membership of the Weber & Heilbroner Employees Benevolent Association knew or approved of the irregularity in the expulsion of the plaintiffs or that there was fraud or bad faith on the part of the membership as a whole. In the absence of such evidence the Court was without power to award recovery of damages as against an unincorporated association. (General Associations Law, Sections 13, 15, 16, 17; Browne v. Hibbets, 290 N. Y. 259, 267.)"
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> *Glauber* v. *Patoff*, 294 N. Y. 583, 584.

Respondent also relies on the case of *Lubliner* v. *Reinlib*, 184 Misc. 472; and again respondent's treatment of the case is, to say the least, misleading; for the actual holding in that case sustains the position of the petitioners herein.

In *Lubliner* v. *Reinlib*, one union brought suit against another for libel. The allegedly libelous statement had been issued in the course of rival organizational campaigns conducted by the two unions which were seeking to organize the same industry. The actual holding of the Court was that the complaint against the union be dismissed because a labor dispute was involved and the complaint failed to allege that the membership of the union as a whole had participated in or authorized the publication of the alleged libel. Accordingly, the Court held maintenance of the action was barred by subdivision 6 of Section 876-a of the Civil Practice Act. In so holding the Court declared:

> "However, the complaint here fails to specify that the defendant union actually participated in, or authorized or ratified the alleged tortious acts. It mentions only in conclusory form, that the 'defendants conspired and agreed among themselves and with others to malign and traduce the said plaintiff and its officers' and that 'the defamatory matter hereinafter more specifically alleged was published by the defendants in pursuance to their said agreement'. Such conclusory allegations, standing alone in an otherwise detailed complaint, and considered in the light of the provisions of subdivision 6 of section 876-a are inadequate as a matter of law to resist a motion under rule 106.
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> "In the complete absence, therefore, of any such allegations in the complaint, the court is constrained to hold that the complaint must be dismissed as against the defendant union, pleaded as an entity, and as against its president, Reinlib, in his representative capacity."

Lubliner v. *Reinlib*, 184 Misc. 472, 480, 481.

There is, of course, no question that in the case at bar, there is a labor dispute. Accordingly, under respondent's own authorities, it is clear that no judgment against the union or against its officers in their representative capacities could properly have been entered, because, as is conceded, the acts complained of were entirely unauthorized by the union or by its officers and were committed by a small dissident group of union members whose dispute was with the union leaders and with the union itself.

Such, at least, is the clearly established rule in cases where suits are brought against labor unions by their members or by other unions. By applying a different rule in the case at bar where the suit against the union was brought by an employer, the Courts of the State of New York have, we respectfully submit, violated the equal protection of the laws clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated herein and for the reasons stated in our original brief in support of our petition for a writ of certiorari, it is respectfully submitted that the writ be granted.

Respectfully submitted,

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